DEVELOPMENTS UNDER THE FREEDOM OF INFORMATION ACT—1980

Congress enacted the Freedom of Information Act (FOIA)[1] in 1966 to provide the public with a procedure for obtaining agency records. In its fourteen-year history the FOIA has been amended four times,[2] and its provisions have been construed in almost one thousand decisions.[3] More than 130 decisions, including four by the Supreme Court, analyzed issues under the FOIA in 1980. In addition, Congress in 1980 amended a statute regulating information disclosure[4] that is incorporated by reference into the FOIA under Exemption 3.[5] Together, these developments show a trend toward restricting disclosure under the Act despite the Act's purpose to "establish a general philosophy of full agency disclosure."[6]

---

1. 5 U.S.C. § 552 (1976) (as amended).

2. Civil Service Reform Act of 1978, Pub. L. No. 95-454, tit. 9, § 906(a)(10), 92 Stat. 1225; Government in the Sunshine Act, Pub. L. No. 94-409, § 5(b), 90 Stat. 1247 (1976); Act of Nov. 21, 1974, Pub. L. No. 93-502, §§ 1-3, 88 Stat. 1561-64; Act of June 5, 1967, Pub. L. No. 90-23, § 1, 81 Stat. 54.

In addition, Congress continues to recommend changes. Representative Preyer introduced two bills in 1980 that would further amend the FOIA. *See* H.R. 7055, 96th Cong., 2d Sess. (1980) (adding a new exemption for materials classified by the Director of the Central Intelligence Agency); H.R. 7056, 96th Cong., 2d Sess. (1980) (creating a new exemption for information obtained by the CIA under an express promise of confidentiality). Representative Quayle introduced a bill in March of 1980 that would expand the definition of an agency under the FOIA to include "any authority of the Congress." *See* H.R. 6870, 96th Cong., 2d Sess. (1980). See generally note 27 *infra*. The first of these bills received a May, 1980 hearing in the House. No action has been taken on either the second or the third.

3. For discussion of developments under the FOIA in prior years, see Comment, *Developments Under the Freedom of Information Act—1979*, 1980 DUKE L.J. 139; Note, *Developments Under the Freedom of Information Act—1978*, 1979 DUKE L.J. 327; Note, *Developments Under the Freedom of Information Act—1977*, 1978 DUKE L.J. 189; Note, *Developments Under the Freedom of Information Act—1976*, 1977 Duke L.J. 532; Note, *Developments Under the Freedom of Information Act—1975*, 1976 DUKE L.J. 366; Note, *Developments Under the Freedom of Information Act—1974*, 1975 DUKE L.J. 416; Comment, *Developments Under the Freedom of Information Act—1973*, 1974 DUKE L.J. 251; Note, *Developments Under the Freedom of Information Act—1972*, 1973 DUKE L.J. 178; Project, *Federal Administrative Law Developments—1971*, 1972 DUKE L.J. 115, 136; Project, *Federal Administrative Law Developments—1970*, 1971 DUKE L.J. 149, 164; Project, *Federal Administrative Law Developments—1969*, 1970 DUKE L.J. 67, 72.

4. Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374 (codified at 15 U.S.C.A. §§ 41-77 (West Supp. 1981)). See notes 177-97 *infra* and accompanying text.

5. Exemption 3 provides that FOIA disclosure obligations do not apply to matters that are "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3) (1976).

6. S. REP. No. 813, 89th Cong., 1st Sess. 3 (1965), *reprinted in* SUBCOMM. ON ADMINISTRATIVE PRACTICE & PROCEDURE OF THE SENATE COMM. ON THE JUDICIARY, FREEDOM OF INFOR-

This comment analyzes the more significant developments under the FOIA in 1980. Part I examines three Supreme Court decisions that discuss the threshold requirement in a requester's suit to compel disclosure under the FOIA: improper withholding of agency records. In *Kissinger v. Reporters Committee for Freedom of the Press*[7] the Court defined the elements of a FOIA suit[8] and narrowly construed the "withholding" criterion to preclude disclosure of documents removed from an agency.[9] The decision in *Forsham v. Harris*,[10] in conjunction with *Kissinger*, requires that an agency have created or obtained the requested documents before they will be accorded "agency records" status; mere possession without control is insufficient to confer such status.[11] Records withheld under the authority of a permanent injunction in *GTE Sylvania, Inc. v. Consumers Union of the United States, Inc.*[12] were deemed properly withheld under the Act.[13]

The comment then in Part II discusses cases construing Exemption 1 of the FOIA, the national-security provision.[14] These cases consider which of two executive orders should control an agency's classification of confidential documents and whether an agency may reassess its classification after a FOIA request. Cases interpreting federal statutes falling within the scope of Exemption 3—which provides for nondisclosure based on a withholding statute—[15] are discussed in Part III.[16] In the major Exemption 3 case of 1980, *Consumer Product Safety Commission v. GTE Sylvania, Inc.*,[17] the Supreme Court held that provisions of the Consumer Product Safety Act[18] protecting manufacturers from the inaccurate publication of submitted information apply both to agency-initiated disclosures and to requests made under the FOIA.[19] Part III also examines the new congressional enactment that restricts the disclo-

---

MATION ACT SOURCE BOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES, 93d Cong., 2d Sess. 38 (1974) [hereinafter cited as SOURCE BOOK].

7. 445 U.S. 136 (1980).

8. See notes 25-55 *infra* and accompanying text.

9. See notes 56-72 *infra* and accompanying text.

10. 445 U.S. 169 (1980).

11. See notes 89-119 *infra* and accompanying text.

12. 445 U.S. 375 (1980).

13. See notes 73-88 *infra* and accompanying text.

14. 5 U.S.C. § 552(b)(1) (1976). See notes 120-49 *infra* and accompanying text. The obligation to disclose attaches only if the request reasonably identifies the requested records. Krohn v. Department of Justice, 628 F.2d 195, 198 (D.C. Cir. 1980); 5 U.S.C. § 552(a)(3)(A) (1976).

15. 5 U.S.C. § 552(b)(3) (1976).

16. See notes 150-213 *infra* and accompanying text.

17. 447 U.S. 102 (1980).

18. 15 U.S.C. §§ 2051-2081 (1976).

19. See notes 155-76 *infra* and accompanying text.

sure of information by the Federal Trade Commission.[20]

Next, Part IV discusses a recent interpretation of the intra-agency memorandum exemption.[21] This interpretation requires the disclosure of numerous legal memoranda used by the Internal Revenue Service.[22] Finally, Part V analyzes one case construing Exemption 7(A), which concerns investigatory records compiled for law enforcement purposes, the disclosure of which would interfere with enforcement proceedings.[23] In *Moorefield v. United States Secret Service*[24] the Court of Appeals for the Fifth Circuit extended the concept of "enforcement proceeding" to include more than adjudicatory proceedings and created a blanket exemption for active Secret Service files.

I. THRESHOLD REQUIREMENTS: IMPROPER WITHHOLDING OF AGENCY RECORDS

The FOIA makes available to "any" person[25] all agency records except those that fall within one or more of the nine statutory exemptions.[26] If an agency[27] denies a request for documents and the denial is upheld on administrative appeal,[28] the requesting party may sue in federal district court for an injunction against withholding the requested records and for an order compelling the production of records wrongfully withheld.[29] As an incentive to information requesters, the Act specifically provides for the assessment of attorney's fees and litigation

20. See notes 177-97 *infra* and accompanying text.

21. 5 U.S.C. § 552(b)(5) (1976).

22. See notes 214-49 *infra* and accompanying text.

23. *See* 5 U.S.C. § 552(b)(7)(A) (1976). See notes 250-66 *infra* and accompanying text.

24. 611 F.2d 1021 (5th Cir.), *cert. denied*, 101 S. Ct. 283 (1980).

25. 5 U.S.C. § 552(a)(3) (1976). For further discussion of parties qualifying under this provision, see 1 J. O'REILLY, FEDERAL INFORMATION DISCLOSURE: PROCEDURES, FORMS AND THE LAW §§ 5.04, 8.07 (1980). *But see* Doyle v. Department of Justice, 494 F. Supp. 842 (D.D.C. 1980) (a fugitive from justice is ineligible).

26. The FOIA exemptions are set forth in 5 U.S.C. § 552(b) (1976).

27. Section 552(e) of the FOIA, *id.* § 552(e), defines "agency" as follows: "[T]he term 'agency' as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency." See note 90 *infra*. *Cf.* Warth v. Department of Justice, 595 F.2d 521 (9th Cir. 1979) (a trial transcript possessed by the Department of Justice is a court document and not a disclosable agency record); Valenti v. Department of Justice, 503 F. Supp. 230 (E.D. La. 1980) (a grand jury transcript possessed by the Justice Department pursuant to FED. R. CRIM. P. 6(e) is a court record to which the FOIA is inapplicable).

28. A requester must exhaust his administrative remedies before instituting suit. K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 20.01 (1976).

29. "[T]he district court . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld . . . ." 5 U.S.C. § 552(a)(4)(B) (1976).

costs against the United States[30] whenever a complainant substantially prevails in a suit to compel disclosure of improperly withheld records.[31]

The FOIA's grant to district courts of "jurisdiction to enjoin [an] agency from withholding agency records and to order the production of any agency records improperly withheld"[32] was the subject of Supreme Court litigation in 1980. *Kissinger v. Reporters Committee for Freedom of the Press*[33] involved FOIA requests seeking transcripts and summaries of Henry Kissinger's telephone conversations that occurred during his tenure as Assistant to the President for National Security Affairs and as Secretary of State. Early in 1976 *New York Times* columnist William Safire filed a FOIA request with the Department of State seeking transcripts of Dr. Kissinger's telephone conversations occurring while he served as Assistant to the President for National Security Af-

30. *Id.* § 552(a)(4)(E). A prevailing requester can recover the attorney's fees he incurs in an action to recover fees as well as those incurred in the substantive suit. *See* Education-Instruccion, Inc. v. HUD, 87 F.R.D. 112 (D. Mass. 1980).

There is a split among the courts of appeals about whether plaintiffs proceeding *pro se* are eligible for attorney's fees where there are no out-of-pocket legal expenses. The Court of Appeals for the District of Columbia Circuit has consistently upheld awards of attorney's fees to plaintiffs representing themselves. *See, e.g.*, Crooker v. Department of Treasury, No. 80-1412 (D.C. Cir. Oct. 23, 1980) (per curiam); Cox v. Department of Justice, 601 F.2d 1 (D.C. Cir. 1979) (per curiam); Holly v. Acree, 72 F.R.D. 115 (D.D.C. 1976), *aff'd sub nom.* Holly v. Chasen, 569 F.2d 160 (D.C. Cir. 1977). One district court decision in the First Circuit followed this view, *see* Marschner v. Department of State, 470 F. Supp. 196 (D. Conn. 1979), but the most recent decision by the Court of Appeals for the First Circuit disagrees. Crooker v. Department of Justice, 632 F.2d 916 (1st Cir. 1980). *Accord*, Crooker v. Department of Treasury, 634 F.2d 48 (2d Cir. 1980); Maxwell Broadcasting Corp. v. FBI, 490 F. Supp. 254 (N.D. Tex. 1980); Burke v. Department of Justice, 432 F. Supp. 251 (D. Kan. 1976), *aff'd mem.*, 559 F.2d 1182 (10th Cir. 1977).

Two courts considering the novel question whether interim attorney's fees could be awarded reached opposite conclusions. The court in Biberman v. FBI, 496 F. Supp. 263 (S.D.N.Y. 1980), held that the FOIA authorizes an interim fee award but "only in those cases in which it is necessary to the continuance of litigation which has proven to be meritorious at the time of the application." *Id.* at 265. In contrast, the District Court for the District of Columbia denied interim attorney's fees in Letelier v. Department of Justice, 1 GOV'T DISCLOSURE SERV. (P-H) ¶ 80,252 (D.D.C. Oct. 2, 1980), though it noted that a final court order is not a prerequisite for a "substantially" prevailing complainant to recover fees. *Id.*

Even if a judgment for attorney's fees is granted, a district court may not tax interest against the government as well. Holly v. Chasen, 639 F.2d 795 (D.C. Cir. 1981) (per curiam).

31. Whether a plaintiff has substantially prevailed is not always clear. *See, e.g.*, Braintree Elec. Light Dep't v. Department of Energy, 494 F. Supp. 287 (D.D.C. 1980) (compelled production of only customer names out of 23 requested documents did not satisfy the "substantially prevailed" standard); Hamlin v. Kelly, No. 79-3902 (N.D. Ill. May 21, 1980) (even though more documents were withheld than were disclosed under the court's order, the sizeable number of documents unjustifiably excised warranted the award of attorney's fees). *See generally* Note, *Developments Under FOIA—1977*, *supra* note 3, at 199-203.

32. 5 U.S.C. § 552(a)(4)(B) (1976), set out in part in note 29 *supra*. The legislative history of the FOIA indicates that this section "contains a specific court remedy for any alleged wrongful withholding of agency records by agency personnel." S. REP. No. 813, 89th Cong., 1st Sess. 8 (1965), *reprinted in* SOURCE BOOK, *supra* note 6, at 43.

33. 445 U.S. 136 (1980).

fairs.[34] The Department denied Safire's request, claiming that the transcripts were not agency records subject to disclosure under the FOIA. Later in 1976 Kissinger removed all telephone conversation transcripts then in his State Department files and donated them to the Library of Congress by a deed that limited public access to the documents.[35]

After Kissinger had donated the notes to the Library of Congress, the Military Audit Project (MAP) and the Reporters Committee for Freedom of the Press (RCFP) filed two similar FOIA requests with the State Department. The MAP and RCFP sought disclosure of telephone conversation transcripts made while Kissinger was both National Security Adviser and Secretary of State.[36] These requests were denied on the grounds that, first, the notes were not agency records and, second, the State Department's custody and control had terminated when the notes were deposited with the Library, thus relieving the Department of its disclosure obligations. The Safire, MAP, and RCFP denials were all upheld on administrative appeal[37] and the requesters brought suit under the FOIA to compel disclosure.[38]

The district court ordered the Library of Congress to return to the State Department those transcripts prepared while Kissinger was Secretary of State, finding that these transcripts were agency records subject to disclosure and that Kissinger's removal of the records without prior permission was wrongful.[39] The court did not, however, order disclosure of the notes prepared while Dr. Kissinger was National Security Adviser.[40] The Court of Appeals for the District of Columbia Circuit

34. Safire requested those transcripts in which his name appeared or in which Kissinger discussed information leaks from the White House. *Id.* at 143.

35. Public access to the telephone notes would not begin until 25 years after the transfer or five years after Kissinger's death, whichever came later, and then only with the consent of the other parties to the conversation, or upon their deaths. Until that time, access was limited to members of the Library staff jointly approved by Dr. Kissinger and the Library, and those receiving permission from a committee to be established in his will. *Id.* at 141-42.

36. Dr. Kissinger served as National Security Adviser from 1968 to 1975 and as Secretary of State from 1973 to 1977. From 1973 to 1975 he held both positions.

37. 445 U.S. at 143-44.

38. The suits were consolidated in the District Court for the District of Columbia. *See* Reporters Comm. for Freedom of the Press v. Vance, No. 77-220, and Military Audit Project v. Department of State, No. 77-391, 442 F. Supp. 383 (D.D.C. 1977), *aff'd mem.*, 589 F.2d 1116 (D.C. Cir. 1978), *aff'd in part and rev'd in part sub nom.* Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136 (1980).

39. Although the district court found that the Library of Congress is not an agency under the FOIA, the court relied on its inherent equitable powers as authority to order the Library to return the documents. *See* 442 F. Supp. at 385-86.

40. The district court denied the requests for notes made while Kissinger was National Security Adviser on the assumption that the plaintiffs had withdrawn their challenge to Kissinger's defense that the White House documents are not "agency records." *See* 442 F. Supp. at 386. This assumption was incorrect. *See* 445 U.S. at 145. The court of appeals therefore affirmed this part

summarily affirmed the order[41] and the Supreme Court granted certiorari.[42]

The Supreme Court first considered whether federal courts had jurisdiction to provide the requested relief. After ruling that neither the Federal Records Act[43] nor the Federal Records Disposal Act[44] conferred authority to grant relief,[45] the Court reviewed the jurisdictional section of the FOIA.[46] Justice Relnquist, writing for the majority, concluded the courts may "devise remedies and enjoin agencies"[47] only if an agency has "(1) 'improperly' (2) 'withheld' (3) 'agency records.' "[48] The Court rejected Safire's request, which was limited to transcripts and notes accumulated while Kissinger was National Security Adviser, because these documents were not "agency records."[49] It rejected the MAP and RCFP requests, made after Kissinger removed the materials

---

of the decision on a different theory: that the notes were not agency records. *See* Reporters Comm. for Freedom of the Press v. Vance, *aff'd mem.*, 589 F.2d 1116 (D.C. Cir. 1978) (affirming without opinion), *aff'd in part and rev'd in part sub nom.* Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 145-46.

41. 589 F.2d 1116 (D.C. Cir. 1978), *aff'd in part and rev'd in part sub nom*. Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136 (1980).

42. 441 U.S. 904 (1979).

43. 44 U.S.C. §§ 2901-2909, 3101-3107 (1976). The Federal Records Act authorizes federal agency heads to establish and administer records management programs, which require retention of documentation of program policies and procedures. *Id.* § 3101; *see* 445 U.S. at 147. Agency heads are authorized to initiate actions through the Attorney General to recover records unlawfully removed from an agency. 44 U.S.C. § 3106 (1976).

44. 44 U.S.C. §§ 3301-3324 (1976 and Supp. II 1978). This Act provides that agency records, as defined by section 3301, may not be alienated or destroyed without the consent of the Administrator of General Services. *Id.* § 3303a; *see* 445 U.S. at 147.

45. The petitioners contended that the Federal Records Act and the Federal Records Disposal Act conferred a private right of action to compel the Library of Congress to transfer the requested documents back to the State Department. The Court, after carefully analyzing the language of the statutes and their legislative histories, refused to recognize such an implied right of action. 445 U.S. at 147-50. *See also* American Friends Serv. Comm. v. Webster, 494 F. Supp. 803 (D.D.C. 1980) (*Kissinger* does not preclude a suit by private plaintiffs for violations of agencies' statutory responsibilities); American Friends Serv. Comm. v. Webster, 485 F. Supp. 222 (D.D.C. 1980) (jurisdiction exists under the Administrative Procedure Act for private plaintiffs to obtain a preliminary injunction forbidding a proposed agency destruction of documents and ordering the FBI to formulate a retention plan as required by statute).

The *Kissinger* Court concluded that only the Attorney General, at the request of an agency official, may sue to recover improperly removed records. 445 U.S. at 148. Two bills introduced in Congress in 1980 would change this result. *See* H.R. 8029, 96th Cong., 2d Sess. (1980) (introduced by Rep. Weiss) (this bill would allow private citizens to sue in similar circumstances); H.R. 7627, 96th Cong., 2d Sess. (1980) (introduced by Reps. Preyer and Weiss) (the bill would allow the Archivist of the United States to recover wrongfully removed agency records).

46. 5 U.S.C. § 552(a)(4)(B) (1976), set out in part in note 29 *supra*.

47. 445 U.S. at 150.

48. *Id.* The Court stated: "Judicial authority to devise remedies and enjoin agencies can only be invoked, under the jurisdictional grant conferred by § 552, if the agency has contravened all three components of this obligation." *Id.*

49. See notes 93-101 *infra* and accompanying text.

from the State Department, on the ground that the documents had not been "withheld."[50]

Although it does not expressly add any requirements to the statute, the Court's reading of the jurisdictional provision requires FOIA requesters to establish, as a threshold element of the litigation, that the requested documents satisfy each of the three criteria.[51] Failure to meet any one of them deprives courts of their power to grant a remedy under the FOIA. Both the FOIA and its legislative history state that the agency has the burden of proving that its withholding is justified.[52] The *Kissinger* Court's requirement of "a showing" that the three criteria have been met[53] indicates that a plaintiff under the FOIA must demonstrate that "agency records" were "improperly" "withheld"—a considerable obstacle—before the burden of proof is imposed on the agency. Moreover, the plaintiff's difficulty is not lessened by amorphous definitions of the criteria[54] and the fact that discovery is occa-

50. See notes 56-72 *infra* and accompanying text. Despite his victory in the Supreme Court, Kissinger later agreed to release a number of the telephone summaries that did not contain purely personal information. Wash. Post, Oct. 10, 1980, § A, at 12, col. 1.

51. 445 U.S. at 150. Whether the Court's interpretation of section 552(a)(4)(B) is directed to the necessary elements of a suit under the FOIA or to the requirements of subject-matter jurisdiction is not clear. *See id.* at 139, 150, 155; *id.* at 161 (Stevens, J., concurring in part and dissenting in part). Although there may be a technical difference between the two notions, the absence of any substantial difference may have accounted for the Court's avoidance of a clear-cut distinction.

52. "[T]he burden is on the agency to sustain its action." 5 U.S.C. § 552(a)(4)(B) (1976). The Senate Judiciary Committee report on S. 1160, 89th Cong., 1st Sess. (1965), the bill that was later codified into the FOIA, states:

> Placing the burden of proof upon the agency puts the task of justifying the withholding on the only party able to explain it. The private party can hardly be asked to prove that an agency has improperly withheld public information because he will not know the reasons for the agency action.

S. REP. No. 813, 89th Cong., 1st Sess. 8 (1965), *reprinted in* SOURCE BOOK, *supra* note 6, at 43. *Accord*, Exxon Corp. v. FTC, 1980-1981 Trade Cas. (CCH) ¶ 63,577, at 77,090 (D.C. Cir. 1980) (recognizing the plaintiff's "distinct disadvantage in attempting to test the claims alleged by the agency").

53. 445 U.S. at 150.

54. Despite an opportunity to explain in clear terms the three FOIA criteria, the Supreme Court in 1980 offered only minimal guidance. While the majority in *Kissinger* found that there is no withholding without custody or control, 445 U.S. at 150-51, Justice Brennan's separate opinion noted: "I am not without some uncertainty about the contours of the 'improper withholding' standard." *Id.* at 158 (Brennan, J., concurring in part and dissenting in part). Justice Stevens, in his separate opinion in *Kissinger*, offered clearer definitions of the criteria: "In my judgment, a 'withholding' occurs within the meaning of FOIA whenever an agency declines to produce agency records it has a legal right to possess or control." *Id.* at 162 (Stevens, J., concurring in part and dissenting in part). With respect to the "improperly withholding" criterion, Justice Stevens stated: "[T]he answer to that question depends on the agency's explanation for its failure to attempt to regain the documents. If the explanation is reasonable, then the withholding is not improper." *Id.* at 166.

Justice Brennan found equally unsatisfying the majority's decision in Forsham v. Harris, 445 U.S. 169, 182 (1980), "that an agency must first either create or obtain a record as a prerequisite to

sionally limited in FOIA cases.[55] *Kissinger* therefore accentuates the plaintiff's burden of coming forward with evidence of the improper withholding of agency records. The impact of this construction of the statute becomes more evident in light of the judicial interpretations of each criterion discussed in the following pages.

A. *"Withholding": Physical Possession versus Legal Custody or Control.*

After determining that the FOIA authorizes relief only after a showing that the agency improperly withheld records, the *Kissinger* Court considered whether the agency receiving the request—the Department of State—had withheld the documents that the MAP and RCFP had requested. Noting that neither the FOIA nor its legislative history defined the term "withholding,"[56] the Court relied on a congressional debate,[57] an Attorney General's Memorandum,[58] cases interpreting the "agency records" requirement,[59] and the purposes of the

---

it becoming an 'agency record' . . . ." He noted that "[t]he Court offers no manageable standards of any kind." *Id.* at 189 n.5 (Brennan, J., dissenting). Justice Brennan's proposal for an "agency records" standard is discussed in note 117 *infra*.

55. Discovery is generally available in FOIA cases, especially to determine the exact number and nature of the agency's files. *See* Slack v. FTC, 1980-1981 Trade Cas. (CCH) ¶ 63,722 (D. Mass. 1980) (discovery may be available to determine whether the requested documents are agency records); 1 J. O'REILLY, *supra* note 25, §§ 8.03-.04. The recognition that FOIA litigation primarily involves a question of law, and the existence of de novo review, has persuaded at least some courts, however, that extensive discovery is unwarranted. *See, e.g.*, Salkin v. Kurtz, No. 79-C-3953 (N.D. Ill. Nov. 4, 1980) (denying plaintiff's requested interrogatives); Murphy v. FBI, 490 F. Supp. 1134 (D.D.C. 1980) (discovery is limited to purely factual issues; a question of fact can arise only after the defendant has filed a responsive motion and accompanying affidavits); Lyle v. IRS, 1978-2 U.S. Tax Cas. 84,867 (N.D. Ga. 1978); Long v. IRS, 1978-1 U.S. Tax Cas. 83,759 (W.D. Wash. 1976), *vacated and remanded on other grounds*, 596 F.2d 362 (9th Cir. 1979), *cert. denied*, 446 U.S. 917 (1980). *See also* Levine, *Using the Freedom of Information Act as a Discovery Device*, 36 BUS. LAW. 45 (1980); Comment, *Developments Under FOIA—1979, supra* note 3, at 159-61.

56. 445 U.S. at 151.

57. Representative Monagan described the FOIA as giving "'access to the information *possessed* by [Government] servants." 112 CONG. REC. 13,652 (1966) (remarks of Rep. Monagan), *quoted in* 445 U.S. at 151 (emphasis added by the Court).

58. The Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act 23-24 (1967), *reprinted in* SOURCE BOOK, *supra* note 6, at 194, 222-23, *quoted in* 445 U.S. at 151, states that the FOIA "refers, of course, only to records in being and in the possession or control of an agency . . . . [It] imposes no obligation to compile or procure a record in response to a request."

59. "Most courts which have considered the question have concluded that the FOIA is only directed at requiring agencies to disclose those 'agency records' for which they have chosen to retain possession or control." 445 U.S. at 151-52 & n.6. *See, e.g.*, Goland v. CIA, 607 F.2d 339, 346-47 (D.C. Cir. 1978), *cert. denied*, 445 U.S. 927 (1980); Ethyl Corp. v. EPA, 478 F.2d 47, 48 (4th Cir. 1973); Ciba-Geigy Corp. v. Mathews, 428 F. Supp. 523, 529 (S.D.N.Y. 1977); Nichols v. United States, 325 F. Supp. 130, 138 (D. Kan. 1971), *aff'd on other grounds*, 460 F.2d 671 (10th

Act[60] in concluding that "withholding" occurs only if the agency has custody of or control over the requested documents. An agency is not "required to retrieve documents which have escaped its possession, [and] which it has not endeavored to recover."[61] Although it refused to define the "full contours of a prohibited 'withholding,' "[62] the Court did decide that an agency does not withhold requested documents when those documents were removed from the agency before the FOIA request.[63] Because the State Department received the MAP and RCFP requests only after Dr. Kissinger had removed the notes,[64] the Court held that the State Department did not have custody or control over the documents[65] and therefore had not withheld them. Accordingly, these claims were denied.[66]

Justices Brennan and Stevens separately concurred in part and dissented in part. Although they agreed with the majority that "withholding" requires "custody or control,"[67] they disagreed with the majority's interpretation of those terms. The majority equated custody or control

---

Cir.), *cert. denied*, 409 U.S. 966 (1972). For further discussion of the "agency records" criterion, see notes 89-119 *infra* and accompanying text.

60. *See* 445 U.S. at 152. The Court based its conclusion about the Act's purposes in part upon the procedural aspects of a FOIA request and the limited amount of time the statute gives agencies to respond to a request (10 days unless there are unusual circumstances, in which case a 10-day extension is permitted). *See* 5 U.S.C. § 552(a)(6) (1976). The Court concluded that "Congress [did not expect] an agency to commence lawsuits in order to obtain possession of documents requested . . . ." 445 U.S. at 153. In addition, the Court noted that the Act provides for agencies to recover the direct costs of document search and duplication: "It is doubtful that Congress intended that a 'search' include legal efforts to retrieve wrongfully removed documents . . . ." *Id.* at 154.

61. 445 U.S. at 152. According to a district court case decided after *Kissinger*, documents located in the French headquarters of the International Police Organization (Interpol) and retrievable by the United States National Central Bureau of Interpol satisfy the "possession or control" test of *Kissinger* because the foreign depository can be considered an affiliate office. *See* Founding Church of Scientology v. Miller, 490 F. Supp. 144, 150-51 (D.D.C. 1980). *See also* 5 U.S.C. §§ 552(a)(6)(A), (B) (1976).

62. 445 U.S. at 150.

63. *Id.* at 150. Similarly, there is no withholding when the requested documents have already been released pursuant to civil discovery in a different suit by the plaintiff against the same agency. Carlisle Tire & Rubber Co. v. Customs Serv., No. 80-1149, slip op. at 7-8 & n.14 (D.C. Cir. Dec. 17, 1980).

64. See text accompanying notes 35-37 *supra*.

65. 445 U.S. at 150-51. The Court noted that whether there has been a withholding must be gauged by when the request was made, because there are no FOIA obligations before this time. The Court found it unnecessary to decide whether this standard, which also governs requests under the subpoena power, *see* Jurney v. MacCracken, 294 U.S. 125, 147-48 (1935), might be rejected if the document is intentionally removed from the agency or whether wrongful removal after a request is filed constitutes a withholding. 445 U.S. at 155 n.9.

66. 445 U.S. at 154-55.

67. *See id.* at 150-51 (majority opinion); *id.* at 159 (Brennan, J. concurring in part and dissenting in part); *id.* at 161 (Stevens, J., concurring in part and dissenting in part).

with physical possession.[68] This interpretation exempts from FOIA scrutiny those documents, such as those at issue in *Kissinger*, that have been removed from agency files. Justice Stevens contended, however, that the majority's interpretation was not mandated by the language of the FOIA, was inconsistent with the purposes of the Act, and would encourage outgoing agency officials to remove damaging information.[69] He proposed, instead, that an agency has custody or control over those documents that it has the legal right to possess.[70] In Justice Stevens's view, failure to take steps to recover documents wrongfully removed would constitute a withholding.[71] Because a withholding is a threshold element of a suit under the FOIA, any interpretation of that requirement that shields true agency records from the public necessarily offends the Act's objective of full disclosure.[72] Justice Stevens recognized the inadequacy of the majority's position and instead construed "withholding" to minimize potential mishandling and to maximize effective disclosure.

B. *"Improper" Withholding.*

In *GTE Sylvania, Inc. v. Consumers Union of the United States, Inc.*,[73] the Supreme Court considered whether records possessed by the Consumer Product Safety Commission, which a court in another suit had enjoined the Commission from disclosing, could be requested and ordered disclosed under the FOIA. Consumers Union filed a FOIA request with the Consumer Product Safety Commission seeking television accident reports obtained by the Commission from several television manufacturers under the Consumer Product Safety Act (CPSA).[74] The Commission agreed to disclose the requested reports[75] and notified the manufacturers of the proposed disclosure.[76] Believing that the pro-

68. See note 65 *supra* and accompanying text. *See also* 445 U.S. at 164-66 & n.9 (Stevens, J., concurring in part and dissenting in part).

69. *See* 445 U.S. at 161 (Stevens, J., concurring in part and dissenting in part).

70. *Id.* at 165. Relying on FOIA's purpose of providing public access to government records, Justice Brennan perceived an obligation for agencies to retain possession of or control over agency records. He therefore believed that the FOIA provides a means of recovering documents no longer within agency control. *Id.* at 159-60 (Brennan, J., concurring in part and dissenting in part).

71. *Id.* at 165 (Stevens, J., concurring in part and dissenting in part).

72. See text accompanying note 6 *supra*.

73. 445 U.S. 375 (1980).

74. 15 U.S.C. §§ 2051-2081 (1976).

75. The Commission determined that no FOIA exemption applied, but that in the public interest it would disclose the requested documents even if one did.

76. The CPSA requires the Commission to notify manufacturers prior to disclosure. *See* 15 U.S.C. § 2055(b)(1) (1976), set out in note 156 *infra*.

posed disclosure would violate the CPSA,[77] the manufacturers obtained temporary restraining orders[78] and later a permanent injunction[79] enjoining the Commission from disclosing the material. Consumers Union then filed suit to enforce its FOIA request.[80]

The issue before the Supreme Court was whether the Commission, by obeying the injunction prohibiting disclosure of the requested documents, was "improperly" withholding the documents.[81] A unanimous Court held that there was not an improper withholding and that the requesters were therefore not entitled to relief.[82]

The Court was confident that the purpose of the FOIA was to prevent "the unjustified suppression of information by agency officials."[83] This conclusion was supported by a Senate Report's interchangeable use of "improperly" and "wrongfully."[84] In *Consumers Union* the presence of the permanent injunction precluded the agency from exercising any discretion over whether to release the documents; thus the traditional FOIA concerns were inapplicable. The agency was "required to obey the injunctions out of 'respect for judicial process.' "[85] Its actions were therefore not improper.[86] In the absence of any express provision in the FOIA or its legislative history, the Court found no basis for re-

77. The manufacturers argued that section 2055(b)(1) of the CPSA, 15 U.S.C. § 2055(b)(1) (1976), proscribed the release of the information from which a manufacturer's identity could be determined if that information was inaccurate or the disclosure would be otherwise unfair. They claimed that the information scheduled for disclosure contained misleading and inaccurate statements, which are prohibited by section 2055(b)(1).

78. The temporary restraining orders are discussed in GTE Sylvania, Inc. v. Consumer Prod. Safety Comm'n, 404 F. Supp. 352, 358 & n.4 (D. Del. 1975) (granting a preliminary injunction).

79. GTE Sylvania, Inc. v. Consumer Prod. Safety Comm'n, 443 F. Supp. 1152 (D. Del. 1977) (permanent injunction granted), *aff'd*, 598 F.2d 790 (3d Cir. 1979), *aff'd*, 447 U.S. 102 (1980), discussed in notes 150-76 *infra* and accompanying text.

80. Consumers Union of the United States, Inc. v. Consumer Prod. Safety Comm'n, 400 F. Supp. 848 (D.D.C. 1975), *rev'd*, 561 F.2d 349 (D.C. Cir. 1977), *vacated and remanded sub nom.* GTE Sylvania, Inc. v. Consumers Union of the United States, Inc., 434 U.S. 1030 (1978), *earlier judgment aff'd sub nom.* Consumers Union of the United States, Inc. v. Consumer Prod. Safety Comm'n, 590 F.2d 1209 (D.C. Cir. 1978), *rev'd sub nom.* GTE Sylvania, Inc. v. Consumers Union of the United States, Inc., 445 U.S. 375 (1980).

81. 445 U.S. at 384.

82. *Id.* at 387.

83. *Id.* at 385.

84. *Id.* at 386 (citing S. REP. No. 813, 89th Cong., 1st Sess. 3, 5, 8 (1965)).

85. 445 U.S. at 386-87.

86. "To construe the lawful obedience of an injunction issued by a federal district court with jurisdiction to enter such a decree as 'improperly' withholding documents under the [FOIA] . . . would extend the Act well beyond the intent of Congress." *Id.* at 387.

quiring the Commission to commit contempt of court in order to satisfy the FOIA requests.[87]

Consumers Union clearly exempts agencies from FOIA disclosure when they have been enjoined from releasing the documents. The holding is a narrow one, however, and given the necessity of establishing that an agency's withholding was improper, the importance of *Consumers Union* may be its silence about what other withholdings would be improper.[88]

C. *"Agency Records."*

The FOIA authorizes courts to order the disclosure only of improperly withheld "agency records."[89] Although the Act defines the term "agency,"[90] neither the Act nor its legislative history contains a definition of "agency records."[91] In contrast to the "withholding" and "improperly" criteria for FOIA applicability, the agency-record re-

87. This position is analogous to the decision in Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 152-53 (1980); in neither case did the Court require the agency to go out of its way to make documents available to the requesters.

88. Other than in cases factually identical to *Consumers Union*, there is no standard for determining when agencies are acting improperly under the FOIA. Furthermore, only *Kissinger* and *Consumers Union* have attempted to construe the "improperly" criterion beyond the case in which an agency with full possession and control withholds information under authority of one of the statutory exemptions. Justice Stevens, writing separately in *Kissinger*, would predicate a finding that a withholding is "improper" on whether an agency's explanation of why it had failed to produce the documents was reasonable. 445 U.S. at 166-67 (Stevens, J., concurring in part and dissenting in part). This position encompasses the decision in *Consumers Union*, is consistent with the presently accepted view that an agency does not improperly withhold information that is shielded by one of the Act's exemptions, and provides courts and litigants with at least a partially useful standard in cases in which the impropriety of an agency's withholding is questionable. The Supreme Court's unwillingness to furnish a standard for determining when there has been an "improper" withholding accentuates the burden on future requesters to make "a showing" that this requirement has been met. *See id.* at 166 n.9 (Stevens, J., concurring in part and dissenting in part). *See also* Weisberg v. Department of Justice, 631 F.2d 824, 830 n.39 (D.C. Cir. 1980) ("[t]he [*Consumers Union*] Court's interpretation of the phrase 'improperly withheld' in FOIA therefore does not resolve whether" a reverse-FOIA suit brought after a FOIA disclosure order could "reverse or remedy that initial order").

89. 5 U.S.C. § 552(a)(4)(B) (1976). See notes 47-48 *supra* and accompanying text.

90. See note 27 *supra*. Section 551(1), specifically cited in subsection (e) of the FOIA, 5 U.S.C. § 552(e) (1976), provides in part:

> For the purpose of this subchapter—
> (1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—
> (A) the Congress;
> (B) the courts of the United States;
> (C) the governments of the territories or possession of the United States;
> (D) the government of the District of Columbia;

5 U.S.C. § 551(1) (1976). Under this provision the United States Tax Court is not an "agency." Ostheimer v. Chumbley, 498 F. Supp. 890 (D. Mont. 1980).

91. *See* Comment, *What Is a Record? Two Approaches to the Freedom of Information Act's Threshold Requirement*, 1978 B.Y.U. L. REV. 408, 408 & n.4.

quirement has been actively disputed.[92] Several cases decided in 1980 considered the requirement.

In *Kissinger*[93] the Court could not dispose of William Safire's request under its "withholding" analysis,[94] because Safire filed his request while the State Department still had possession of Kissinger's telephone conversation transcripts. Instead, the Court held that the documents Safire requested were not agency records.[95] Safire's request was limited to telephone conversation transcripts made during Kissinger's tenure as National Security Adviser that contained Safire's name or discussed White House information leaks. The Court reasoned that as National Security Adviser, Kissinger was a member of the President's personal staff.[96] Although the "Executive Office of the President" is subject to the FOIA,[97] the Court held that the Office of the President is exempt.[98] The Court based its conclusion on the Conference Report for the 1974 FOIA amendments, which stated that the term "agency" does not include "the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President . . . ."[99]

Although the requested documents were in the possession of the State Department at the time of the request, the Court decided that this did not make them agency records; the State Department had never generated, controlled, or used them.[100] The determination that posses-

92. *See generally* Note, *The Definition of "Agency Records" Under the Freedom of Information Act*, 31 STAN. L. REV. 1093 (1979).

93. Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136 (1980). For further discussion of the facts and issues in *Kissinger*, see notes 33-72 *supra* and accompanying text.

94. See text accompanying notes 56-72 *supra*.

95. 445 U.S. at 157.

96. *Id.* at 156.

97. *Id.* See note 27 *supra*.

98. *Id.*; *cf.* Crooker v. Office of the Pardon Attorney, 614 F.2d 825, 828 (2d Cir. 1980) (per curiam) (the Office of the Pardon Attorney, a part of the Executive branch, comes under the FOIA because it does not come under the exception provided for persons or "units in the Executive Office whose sole function is to advise and assist the President" (citation omitted)).

99. 445 U.S. at 156. The petitioners further argued that because of Kissinger's status as National Security Adviser, the requested records "may have related" to the National Security Council, an agency, and thus would have been subject to the FOIA. The Court refused to reach this argument, finding that the request did not mention that the documents related to the Council, and that the State Department was not otherwise on notice that it should have referred the request to the Council. *Id.* at 156-57. By so construing the request, the Court left unresolved whether an agency violates the FOIA by refusing to disclose records of another agency or by failing to refer the request to another agency. *Cf.* Crooker v. State Dep't, 628 F.2d 9 (D.C. Cir. 1980) (an agency is under no obligation to release documents the plaintiff had previously received from another agency).

100. *See* 445 U.S. at 157. *See also* Forsham v. Harris, 445 U.S. 169, 185 n.16 (1980) ("We certainly do not indicate, however, that physical possession, or initial creation, is by itself always sufficient"); *id.* at 177 n.7 ("reliance on a document does not make it an agency record if it has not

sion without control is insufficient to render documents agency records[101] comports with the 1978 decision by the Court of Appeals for the District of Columbia Circuit in *Goland v. CIA*.[102] The *Goland* court held that a 1947 congressional hearing transcript, retained in Central Intelligence Agency (CIA) files and used by the CIA to interpret its own charter and related legislation,[103] was not an agency record. Rejecting the argument that agency possession of the requested document automatically made it an agency record, the court concluded that Congress's release of the transcript for a limited purpose and under an express denomination of "Secret" indicated an intent to maintain congressional control over the transcript.[104] Together, *Kissinger* and *Goland* establish that the agency to whom the FOIA request is made must have control over the requested documents.[105] If another agency

---

been created or obtained by a federal agency. Reliance or use may well be relevant, however, to the question of whether a record in the possession of an agency is an 'agency record' ").

101. At least one court has interpreted the decision in *Kissinger* as indicating the Court's approval of a "control" test for making the agency records decision. *See* Carson v. Department of Justice, 631 F.2d 1008, 1011 (D.C. Cir. 1980). In *Carson* the court held that pre-sentence reports prepared by United States courts (which do not have agency status, 5 U.S.C. § 551(1)(B) (1976)) pursuant to FED. R. CRIM. P. 32(c), but in the possession of the Parole Commission (an agency), were agency records under the FOIA. *Id.* at 1015. After reviewing the effects of the Parole Commission and Reorganization Act of 1976, 18 U.S.C. §§ 4201-4218 (1976), and the 1974 amendments to FED. R. CRIM. P. 32(c), *see* 416 U.S. 1005 (1974), the court concluded that the Commission's heightened authority to disclose the reports and reduced discretion to withhold them was evidence of sufficient control to accord them status as agency records. *Id.* at 1013; *cf.* Cook v. Willingham, 400 F.2d 885 (10th Cir. 1968) (per curiam) (prior to 1976 statutory changes in parole procedures, pre-sentence reports were held not to be agency records under the FOIA).

102. 607 F.2d 339 (D.C. Cir. 1978), *cert. denied*, 445 U.S. 927 (1980). The Supreme Court denied certiorari in *Goland* fourteen days after deciding *Kissinger*.

103. 607 F.2d at 342-43.

104. *Id.* at 345-48 & n.48.

105. *See* 445 U.S. at 150-51; 607 F.2d at 346-47. *See also* FTC v. Owens-Corning Fiberglas Corp., 626 F.2d 966, 971 n.9 (D.C. Cir. 1980) ("The nsual test for a document not originated in the agency looks to 'whether under all the facts of the case the document has passed from the control of [its originator] and become property subject to the free disposition of the agency with which the document resides' ") (quoting Goland v. CIA, 607 F.2d 339, 347 (D.C. Cir. 1978), *cert. denied*, 445 U.S. 927 (1980)).

The Court of Appeals for the District of Columbia Circuit recently reaffirmed the control test of *Goland* in Holy Spirit Ass'n v. CIA, 636 F.2d 838 (D.C. Cir. 1980), and Ryan v. Department of Justice, 617 F.2d 781 (D.C. Cir. 1980). In *Holy Spirit* the court considered whether two groups of documents about Congress's investigation of Korean-American relations were agency records. In assessing the existence of congressional control over the documents, the court noted that the *Goland* court had relied on two considerations in finding agency-records status: (1) "the circumstances attending the document's creation" and (2) "the conditions under which it was transferred to the agency." 636 F.2d at 841. The first group of documents was created by various congressional committees and later sent to the CIA. In *Holy Spirit* the court could find no circumstances surrounding the creation of these documents that indicated congressional intent to classify the documents as confidential or secret, despite their "sensitive" nature. Similarly, transfer of the documents to the CIA without any showing of intended control or classification justified agency

or nonagency has a higher degree of control, even physical possession will not make the requested documents become agency records of the possessing agency.[106]

In *Forsham v. Harris*[107] the Supreme Court addressed the mirror image of the question raised by *Goland* and *Kissinger*: whether documents *not* in the possession of an agency can nevertheless be agency

-records categorization under the "conditions under which it was transferred" criterion. *Id.* at 842.

The second group of documents were prepared by the CIA, sent to Congress, and later returned to the CIA "without instruction." After employing the two-pronged *Goland* test, the court was unable to find continued congressional control and therefore held that the documents in this group were records of the CIA. The court expressly left unresolved whether "agency-created records, when sent to Congress, can lose their status as agency records and become exempt from FOIA disclosure" if Congress retains control over them—a reverse application of *Goland*. *Id.* at 842-43.

The requesters in *Ryan* (which was decided before *Kissinger*) sought senatorial responses to a Department of Justice questionnaire concerning procedures used for selecting and recommending potential federal district court judges. Because the Attorney General had sole control over the responses, the court, employing the *Goland* test, held that they were agency records of the Justice Department. The court rejected the argument that the Attorney General was not an agency because he often functioned purely as an adviser to the President. There had been no Presidential advising with respect to the requested documents. Furthermore, the court stated that "[a]ny unit or official that is part of an agency and has non-advisory functions cannot be considered a nonagency in selected contexts on a case by case basis." 617 F.2d at 789. *See* Pacific Legal Foundation v. Council on Environmental Quality, 636 F.2d 1259, 1264-65 (D.C. Cir. 1980); *cf.* Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 156-58 (1980) (Kissinger, as National Security Adviser, acted in a purely advisory capacity and his telephone notes were therefore not agency records).

106. *See* 445 U.S. at 157 (by implication); 607 F.2d at 347. What constitutes control over documents for the purpose of determining whether they are agency records remains unclear. *Kissinger*, like *Goland*, indicates that mere possession is inadequate. 445 U.S. at 157. The *Holy Spirit Ass'n v. CIA* court perpetuated the uncertainty surrounding the requisite degree of control by refusing to require that "Congress give contemporaneous instructions when forwarding congressional records to an agency" and declining to "direct Congress to act in a particular way in order to preserve its FOIA exemption for transferred documents." 636 F.2d at 842. The court did note that *Goland* requires "some clear assertion of congressional control," *id.*, and found that Congress had made no such assertion over these documents.

On the other hand, photographs possessed by the Justice Department were held to be agency records in Weisberg v. Department of Justice, 631 F.2d 824 (D.C. Cir. 1980), even though a private citizen had taken and copyrighted the photographs. The photographs had been submitted to the Federal Bureau of Investigation for use in its investigation of the assassination of Dr. Martin Luther King, Jr. Distinguishing SDC Dev. Corp. v. Mathews, 542 F.2d 1116 (9th Cir. 1976), in which the court had refused to confer agency-record status upon a computerized medical reference library, the *Weisberg* court concluded that the photographs "reflect the . . . operation, or decision-making functions" of the Bureau and should be considered agency records despite the private copyright. 631 F.2d at 828 (quoting SDC Dev. Corp. v. Mathews, 542 F.2d at 1120). *See also* Navasky v. CIA, 499 F. Supp. 269 (S.D.N.Y. 1980) (documents prepared by the CIA at the request of a congressional committee are not agency records under *Goland*; the express desire of the committee to prohibit disclosure other than by committee approval constitutes sufficient congressional control).

107. 445 U.S. 169 (1980).

records.[108] The requesters in *Forsham* sought raw data acquired during a long-term diabetes study by a research group funded by a subdivision of the Department of Health, Education, and Welfare (HEW). The plaintiff requesters claimed that the raw data were agency records because (1) the research group was funded by and under the supervision of a federal agency; (2) the subdivision of HEW that funded the group had authority to obtain possession and permanent custody of the data upon request; and (3) the Food and Drug Administration had used the group's report.[109] Justice Rehnquist, writing for the majority, affirmed the lower court's conclusion that the data were not agency records.[110] The Court concluded, first, that funding and supervision by a federal agency that falls short of "substantial federal supervision" would not make an otherwise private group a federal entity.[111] Second, though noting that records of a nonagency could become agency records,[112] the Court believed that an agency's mere potential access or custody was insufficient to justify such a transformation.[113] Finally, the Court concluded that "an agency must first either create or obtain a record as a prerequisite to it becoming an 'agency record' within the meaning of the FOIA."[114] The Court emphasized that the "FOIA applies to records which have been *in fact* obtained, and not to records

108. For further discussion of the court of appeals decisions in *Goland* and *Forsham*, see Note, *Developments Under FOIA—1978, supra* note 3, at 328-31. Although this issue was present in *Kissinger* with respect to the MAP and RCFP requests, the Court concluded that the documents were never withheld and therefore found it "unnecessary to decide whether the telephone notes were 'agency records'. . . ." 445 U.S. at 150.

109. 445 U.S. at 177.

110. *Id.* at 176-78.

111. *Id.* at 179-80. The Court indicated that if there were substantial federal supervision, defined in United States v. Orleans, 425 U.S. 807, 815 (1976), as day-to-day supervision by the federal government, a private group could attain the status of a federal entity, and its documents the status of agency records. 445 U.S. at 180 & n.11. The Court intimated in *Forsham* that federal grantees would rarely be able to meet this standard. *See id.* at 180 & n.11, 182. The substantial-federal-supervision test parallels the substantial-government-control test promulgated in Ciba-Geigy Corp. v. Mathews, 428 F. Supp. 523, 529 (S.D.N.Y. 1977). *See generally* Note, *Developments Under FOIA—1978*, *supra* note 3, at 328-31; Note, *supra* note 92, at 1111-14.

One case employing the substantial-federal-supervision test of *Forsham* concluded that a private, independent group of physicians was not sufficiently supervised by its agency funding source to render it an agency under the FOIA. *See* St. Mary Hosp. v. Philadelphia Professional Standards Review Org., Inc., 48 Ad. L.2d 1131, 1137 (E.D. Pa. 1980). *Contra*, Public Citizen Health Research Group v. HEW, 449 F. Supp. 937 (D.D.C. 1978) (decided before *Forsham*).

112. 445 U.S. at 181.

113. *Id.* at 181-86. In his dissent, Justice Brennan agreed with the Court's determination that "[r]ecords of a nonagency certainly could become records of an agency as well," but he disagreed with the Court's reasons for concluding that it did not occur in this case. *Id.* at 187 (Brennan, J., dissenting) (quoting the majority opinion, *id.* at 181).

114. *Id.* at 182 (majority opinion).

which merely *could have been* obtained,"[115] but declined to define those terms beyond the facts of the case.[116]

Forsham establishes that documents are not agency records unless the agency receiving the request has "created or obtained" them. In making this determination the Court considers the agency's use of the records, the degree of federal supervision over a nonagency, whether a federal agency has exercised a right of access to nonagency documents, or other special circumstances.[117] Justice Brennan noted in dissent in *Forsham*, however, that the Court "never addresse[d] the full, combined force of the arguments," and that the Court's opinion "offer[ed] no manageable standards of any kind."[118]

Forsham's requirement of substantial federal supervision of the agency creating the records and *Kissinger*'s unwillingness to attribute documents to a possessing agency unless that agency controls them, indicate that agencies may be able to circumvent the FOIA's disclosure provisions in certain instances. Substantial federal supervision, which is synonymous with day-to-day agency control,[119] is difficult for a requester to demonstrate. Similarly, a requester may find it hard to prove that records in the physical possession of an agency are subject to the requisite degree of control by the agency. In sum, in 1980 the FOIA's threshold requirements were shown to be significant obstacles for requesters to overcome.

II. THE NATIONAL SECURITY EXEMPTION

Exemption 1 of the FOIA, the national security exemption, applies to documents that are classified pursuant to an executive order that sets standards for keeping records secret in the interest of national defense

115. *Id.* at 186 (emphasis in original).

116. The Court noted: "We need not categorize what agency conduct is necessary to support a finding that it has 'obtained' documents, since an unexercised right of access clearly does not satisfy this requirement." *Id.* at 186 n.17.

117. *See id.* at 177 n.7, 180-82. Justice Brennan's dissent in *Forsham* proposed two different criteria to consider in determining whether records of a nonagency became agency records: "the importance of the record to an understanding of Government activities" and the existence of "a link between the agency and the record." 445 U.S. at 189 (Breunan, J., dissenting). The first could be proved by observing the agency's application and dependence on the information in its writings and internal decisions. *Id.* The second could be verified by examining

> the degree to which the impetus for the creation of the record came from the agency or was developed independently, the degree to which the creation of the record was funded publicly or privately, the extent of governmental supervision of the creation of the record, and the extent of continuing governmental control over the record.

Id. at 190.

118. *Id.* at 189 nn.5 & 6 (Brennan, J., dissenting).

119. See note 111 *supra*.

or foreign policy.[120] The FOIA expressly provides that, to be exempt, a document must be "in fact properly classified pursuant to such Executive order."[121] Executive Order No. 12,065,[122] which President Carter issued on June 28, 1978, establishes the current classification criteria. When documents requested under the FOIA were classified pursuant to a prior executive order, however, confusion arises concerning which order should be applied by the agency processing the request or by the court reviewing the agency's classification decision. The Supreme Court left this question open in its 1973 decision in *EPA v. Mink*.[123]

In *Lesar v. United States Department of Justice*[124] the Court of Appeals for the District of Columbia Circuit squarely addressed the issue, holding that the executive order in force when agency officials last classified the document is controlling.[125] Lesar requested documents and reports from the Department of Justice about the Federal Bureau of Investigation (FBI) inquiry into Dr. Martin Luther King, Jr., and his assassination. The requested records had been classified under a 1972 executive order in effect at the time of the request.[126] In response to Lesar's FOIA request, the Justice Department released some of the documents but withheld others pursuant to various FOIA exemptions

120. 5 U.S.C. § 552(b)(1) (1976). Exemption 1 exempts from disclosure "matters that are . . . (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." *Id.*

Use of information classified by "Executive order, statute, or regulation" may also be regulated under the Classified Information Procedures Act enacted October 15, 1980. Pub. L. No. 96-456, 94 Stat. 2025 (1980), 18 U.S.C.A. app., at 361 (West Supp. 1981). The Act requires criminal defendants to notify the government and the court of any classified information that the defendant intends to disclose at trial or pretrial proceedings and provides procedures for the review of such information before its introduction in open court. *See generally* S. REP. No. 823, 96th Cong., 2d Sess. (1980), *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 7738.

121. 5 U.S.C. § 552(b)(1) (1976).

122. 3 C.F.R. 190 (1979), *reprinted in* 50 U.S.C.A. § 401 note, at 64 (West Supp. 1980), *as amended by* Exec. Order No. 12,148, § 5-209, 3 C.F.R. 412, 418 (1980), *and* Exec. Order No. 12,163, § 1-903(b)(2), 3 C.F.R. 435, 443 (1980). For further discussion of Executive Order No. 12,065, *see* 1 J. O'REILLY, *supra* note 25, at § 11.03; Comment, *Developments under FOIA—1979, supra* note 3, at 146-48.

123. 410 U.S. 73 (1973). In *Mink* a new executive order became effective while a FOIA suit, in which documents had been withheld under authority of a prior order, was on appeal. The Supreme Court applied the earlier order's criteria but did not resolve the issue of which order was controlling, because it concluded that the records were properly classified under the new order as well. *Id.* at 84 nn.9 & 10. *See* Lesar v. Department of Justice, 636 F.2d 472, 480 n.42 (D.C. Cir. 1980).

124. 636 F.2d 472 (D.C. Cir. 1980).

125. *Id.* at 480.

126. Exec. Order No. 11,652, 3 C.F.R. 678 (1971-1975 Compilation) (superseded).

and a court order.[127] In a suit to compel disclosure of the records the district court upheld the agency's reliance on the 1972 executive order to withhold excerpts of the documents.[128]

On December 1, 1978, about four months after the district court's decision in *Lesar*, Executive Order No. 12,065 took effect.[129] The new executive order states that information can be classified under the criteria of the new order or under prior executive orders.[130] In addition, although under the prior order agencies were required to classify documents at the time of their origin,[131] the new order specifically authorizes classification at a later date.[132] On appeal, Lesar argued that the case should be remanded for a reclassification of the withheld materials under the new executive order. The court disagreed, holding that "*a reviewing court should assess classification under the Executive Order in force at the time the responsible official finally* [classifies the documents]."[133] The court reasoned that under the terms of the new executive order, a document properly classified under the prior order would retain its status unless the agency reclassified the documents while the new order was in effect.[134]

Lesar also argued that two of the requested documents had not been classified at the time of their origin as required by the prior executive order[135] and that violation of this procedural criterion required release of the documents or a remand to determine whether disclosure

127. The department withheld records under Exemptions 1, 2, 6, 7(C), 7(D), and 7(E) of the FOIA and pursuant to Lee v. Kelly, Nos. 76-1185 & 76-1186 (D.D.C. Jan. 31, 1977) (ordering the FBI's actual surveillance records and tapes on Dr. King to be put under seal for 50 years).

128. *See* Lesar v. Department of Justice, 455 F. Supp. 921 (D.D.C. 1978), *aff'd*, 636 F.2d at 472 (D.C. Cir. 1980).

129. Exec. Order No. 12,065, 3 C.F.R. 190 (1979), *reprinted in* 50 U.S.C.A. § 401 note, at 64 (West Supp. 1980), *as amended by* Exec. Order No. 12,148, § 5-209, 3 C.F.R. 412, 418 (1980) *and* Exec. Order No. 12,163, § 1-903(b)(2), 3 C.F.R. 435, 443 (1980).

130. Exec. Order No. 12,065, § 6-102, 3 C.F.R. 190, 204 (1979), *reprinted in* 50 U.S.C.A. § 401 note, at 71 (West Supp. 1980). *See also* Lesar v. Department of Justice, 636 F.2d at 480.

131. Although the executive order did not explicitly require classification at origin, an agency directive did require such classification. *See* National Security Council Directive of May 17, 1972, Governing the Classification, Downgrading, Declassification and Safeguarding of National Security Information IV (A), 37 Fed. Reg. 10,053, 10,056-57 (1972) ("At the time of origination, each document shall be marked with its assigned security classification"), *discussed in* Lesar v. Department of Justice, 636 F.2d at 483-84.

132. *See* Exec. Order No. 12,065, § 1-606, 3 C.F.R. 190, 194-95, *reprinted in* 50 U.S.C.A. § 401 note, at 66 (West Supp. 1980).

133. 636 F.2d at 480 (emphasis in original). The court noted that materials originally classified under one executive order could be reclassified after enactment of a new order or after a FOIA request, and that a reviewing court should assess the document's classification in light of the executive order "under which the agency made its ultimate classification determination." *Id.*

134. *Id.*

135. *Id.* at 483-84.

would damage the national security. Lesar based his contention on the decision in *Halperin v. Department of State*.[136] In that case the court had ordered a remand to the district court for *in camera* review of documents—allegedly exempt under Exemption 1—because the agency had failed to classify the requested documents at their origination and had failed to follow the substantive criteria of the executive order.[137] There was no substantive violation in *Lesar*, however, and the *Lesar* court held that the procedural defect, by itself, did not indicate an "undermining" of the overall classification process and thus did not warrant a remand.[138]

Though recognizing that certain substantive, as well as procedural, violations may require remand for *in camera* review, the *Lesar* court explained that "others may be insignificant, undermining not at all the agency's classification decision. We believe that the procedural violation involved in this case plainly falls within the latter category."[139] What other procedural defects will be found too insignificant to require *in camera* review remains unclear.[140] The court's willingness to overlook a procedural defect in spite of the statutory requirement that a document be "in fact properly classified pursuant to such Executive order"[141] permits at least some agency mishandling and denies disclosure to requesters although the statute ostensibly provides no exemption.[142]

---

136. 565 F.2d 699 (D.C. Cir. 1977).

137. *Id.* at 703-07.

138. 636 F.2d at 481-85 (footnotes omitted).

139. *Id.* at 485 (footnote omitted). The *Lesar* court was careful not to condone procedural defects, however, noting that Exemption 1 requires conformity with the procedural as well as substantive criteria. *Id.*

140. *In camera* inspection is necessary, stated Chief Judge Wright in a recent opinion, in cases "[w]here the agency affidavits merely parrot the language of the statute and are drawn in conclusory terms . . . ," and make meaningful de novo review impossible. Allen v. CIA, 636 F.2d 1287, 1298 (D.C. Cir. 1980). Circumstances that support the use of *in camera* inspection include judicial economy, agency bad faith, disputes concerning the document's contents, agency proposal of *in camera* inspection, and the presence of a strong public interest in disclosure of the disputed records. *Id.* at 1298-99. *See also* Stephenson v. IRS, 629 F.2d 1140 (5th Cir. 1980) (reversing a summary judgment for the agency based on generic and misleading affidavits and remanding for further factual development but not specifying the method to be used).

141. 5 U.S.C. § 552(b)(1)(B) (1976).

142. In contrast, a different panel of the Court of Appeals for the District of Columbia Circuit put prime importance on the literal language of the FOIA in Gregory v. Federal Deposit Ins. Corp., 631 F.2d 896 (D.C. Cir. 1980) (per curiam), *rev'g in part* 470 F. Supp. 1329 (D.D.C. 1979). The court of appeals in *Gregory* reversed the lower court determination that Exemption 8, 5 U.S.C. § 552(b)(8) (1976), which exempts matters "contained in . . . reports prepared by . . . an agency responsible for the regulation . . . of financial institutions" did not apply to reports of the FDIC describing two banks which had closed. Despite the district court's fear that application of the exemption would be inconsistent with the purposes of the FOIA, the court of appeals applied the statute "in accordance with its plain meaning," 631 F.2d at 898, holding that the disputed

The Court of Appeals for the District of Columbia Circuit further defined the obligations of agencies to follow executive order classification procedures in *Baez v. United States Department of Justice*.[143] Joan Baez had requested all information containing her name possessed by the FBI. Several of the requested documents were withheld under Exemption 1. As in *Lesar*, some of the documents had not been classified at their origin, but were classified only after the FOIA request.[144] After Baez filed suit in district court, but before the case came to trial, Executive Order No. 12,065[145] became effective. The withheld information was then reclassified under the new executive order. The district court upheld all the exemption claims and denied disclosure.[146]

On appeal Baez argued that the documents that were not classified until her request could not receive Exemption 1 protection; failure to classify them at origination violated a procedural requirement under the prior executive order, and Exemption 1 specifically requires compliance with the classifying procedures. The court of appeals first held that, as in *Lesar*, the procedural defect in *Baez* did not warrant either remand for *in camera* inspection or release.[147] Second, the court found that all the withheld records were properly classified under the new executive order. Because that order permitted delayed classification, Exemption 1 authorized the withholding. The court also concluded that agencies may review their initial classification decisions after receiving FOIA requests, or when a current executive order is superseded or amended while a FOIA case is still under consideration in the trial court. Such reclassification, the court explained, ensures protection of national security interests, which is the purpose of Exemption 1.[148] The *Baez* decision thus leaves an agency free to withhold previously unclassified records under Exemption 1 if, after a FOIA request, the agency perceives a need to protect the requested information for national security reasons. Both *Lesar* and *Baez* illustrate the trend of increased

records were protected by Exemption 8. For further discussion of the district court opinion in *Gregory*, see Comment, *Developments Under FOIA—1979, supra* note 3, at 168-69.

143. 1 GOV'T DISCLOSURE SERV. (P-H) ¶ 80,238 (D.C. Cir. 1980).

144. *See id.* at 80,593; Lesar v. Department of Justice, 636 F.2d at 484 n.64

145. Exec. Order No. 12,065, 3 C.F.R. 190 (1979), *reprinted in* 50 U.S.C.A. § 401 note, at 64 (West Supp. 1980), *as amended by* Exec. Order No. 12,148, § 5-209, 3 C.F.R. 412, 418 (1980), *and* Exec. Order No. 12,163, § 1-903(b)(2), 3 C.F.R. 435, 443 (1980).

146. No. 76-1922, Statement of Reasons (D.D.C. July 5, 1979) (unpublished), *aff'd*, 1 GOV'T DISCLOSURE SERV. (P-H) ¶ 80,238 (D.C. Cir. 1980).

147. 1 GOV'T DISCLOSURE SERV. (P-H) at 80,593-95; *see* Carlisle Tire & Rubber Co. v. Customs Serv., 1 GOV'T DISCLOSURE SERV. (P-H) ¶ 79,266 (D.C. Cir. 1980).

148. 1 GOV'T DISCLOSURE SERV. (P-H) at 80,594-95.

deference toward agency classification of national security information.[149]

III. THE FEDERAL STATUTES EXEMPTION

Exemption 3 makes the FOIA's disclosure provisions inapplicable when another federal statute expressly "(A) requires that the matters be withheld . . . , or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld . . . ."[150] When an agency relies on Exemption 3 to deny disclosure, the court must interpret provisions of acts other than the FOIA to determine whether the requested information is exempt. The Consumer Product Safety Act[151] (CPSA), the Federal Trade Commission Improvements Act,[152] and section 6103 of the Internal Revenue Code[153] all received judicial attention in 1980, as did several other federal statutes.[154]

149. *Cf.* Hayden v. National Security Agency, 452 F. Supp. 247, 249 (D.D.C. 1978) (the disclosure of certain National Security Agency operations, intelligence sources, and methods is exempt under Exemption 1), *aff'd sub nom.* Hayden v. National Security Agency/Central Security Serv., 608 F.2d 1381, 1388 (D.C. Cir. 1979) ("This is precisely the sort of situation where Congress intended reviewing courts to respect the expertise of an agency"), *cert. denied*, 446 U.S. 937 (1980).

150. 5 U.S.C. § 552(b)(3) (1976).

151. 15 U.S.C. §§ 2051-2081 (1976 & Supp. III 1979), discussed in notes 155-76 *infra* and accompanying text.

152. Pub. L. No. 96-252, 94 Stat. 374 (1980) (codified in 15 U.S.C.A. §§ 41-77 (West Supp. 1981)), discussed in notes 177-97 *infra* and accompanying text.

153. I.R.C. § 6103, discussed in notes 198-213 *infra* and accompanying text.

154. One case brought the Communications Act, 47 U.S.C. § 605 (1976), within the ambit of Exemption 3. In Reston v. FCC, 492 F. Supp. 697 (D.D.C. 1980), the court held that an amateur radio operator's recordings of a religious sect's radio transmission, which he gave to the Federal Communications Commission, were exempt from FOIA disclosure because section 605 of the Communications Act prohibited disclosure of such communications to all but a specified group of persons, which did not include the FOIA requester. The statute's specific prohibitions on disclosure qualified it as a withholding statute under Exemption 3. *But see* Church of Scientology v. Postal Serv., 633 F.2d 1327 (9th Cir. 1980), holding that section 410(c)(6) of the Postal Reorganization Act, 39 U.S.C. § 410(c)(6) (1976), which exempts "investigatory files, whether or not considered closed, compiled for law enforcement purposes except to the extent available by law to a party other than the Postal Service," is not a withholding statute under Exemption 3 of the FOIA because the provision lacks sufficient specificity. See notes 250-66 *infra* and accompanying text.

Another 1980 case involving Exemption 3 defined the "intelligence sources" provision of the National Security Act, 50 U.S.C. § 403(d)(3) (1976), which requires the Director of the CIA to protect "intelligence sources and methods from unauthorized disclosure." In this case—the first to generate a definition of "intelligence sources"—the Court of Appeals for the District of Columbia Circuit construed the term to mean:

> [A] person or institution that provides, has provided, or has been engaged to provide the CIA with information of a kind the Agency needs to perform its intelligence function effectively, yet could not reasonably expect to obtain without guaranteeing the confidentiality of those who provide it.

Sims v. CIA, 49 Ad. L.2d 301, 314 (D.C. Cir. 1980). The court declined to adopt the broader definition proposed by the CIA. *Id.* at 310-11. *See also* Navasky v. CIA, 499 F. Supp. 269, 275 (S.D.N.Y. 1980) ("authors, publishers and books involved in clandestine propaganda activities" are not "intelligence sources and methods" under section 403(d)(3)).

A. *The Consumer Product Safety Act.*

The Supreme Court in *Consumer Product Safety Commission v. GTE Sylvania, Inc.*,[155] resolved a conflict that had arisen between the Courts of Appeals for the Second and Third Circuits over the effect of section 6(b)(1)[156] of the CPSA on disclosures made pursuant to FOIA requests. Section 6(b)(1) requires the Consumer Product Safety Commission to notify manufacturers who had submitted information to the agency and to supply them with a summary of any proposed disclosure, if the identity of the manufacturer could be ascertained from the disclosed information. The Commission must give the submitters a reasonable time to comment on the disclosure[157] and must ensure that the disclosure is fair and accurate.[158]

In *Pierce & Stevens Chemical Corp. v. United States Consumer Product Safety Commission*[159] and *GTE Sylvania, Inc. v. Consumer Product Safety Commission*,[160] manufacturers that had submitted information to the Commission sued to prevent disclosure of the information, claiming that the Commission had violated the "fair and accurate" provisions of section 6(b)(1).[161] Although the Commission

155. 447 U.S. 102 (1980).

156. 15 U.S.C. § 2055(b)(1) (1976). Section 6(b)(1) provides in part:

> [T]he Commission shall, to the extent practicable, notify, and provide a summary of the information to, each manufacturer or private labeler of any consumer product to which such information pertains, if the manner in which such consumer product is to be designated or described in such information will permit the public to ascertain readily the identity of such manufacturer or private labeler, and shall provide such manufacturer or private labeler with a reasonable opportunity to submit comments to the Commission in regard to such information. The Commission shall take reasonable steps to assure, prior to its public disclosure thereof, that information from which the identity of such manufacturer or private labeler may be readily ascertained is accurate, and that such disclosure is fair in the circumstances and reasonably related to effectuating the purposes of this chapter.

Id. For further discussion of section 6(b)(1), see Note, *The Impact of Restrictive Disclosure Provisions on Freedom of Information Act Requests: An Analysis of Section 6(b)(1) of the Consumer Product Safety Act*, 64 MINN. L. REV. 1021 (1980).

157. Section 6(b)(1) requires the CPSC to notify manufacturers "not less than 30 days prior to its public disclosure." 15 U.S.C. § 2055(b)(1) (1976).

158. *Id.* See note 156 *supra*.

159. 585 F.2d 1382 (2d Cir. 1978).

160. 598 F.2d 790 (3d Cir. 1979), *aff'd*, 447 U.S. 102 (1980).

161. See note 156 *supra*. An action to prevent disclosure under the FOIA is known as a reverse-FOIA suit. The Supreme Court discussed the issue of reverse-FOIA suits in Chrysler Corp. v. Brown, 441 U.S. 281 (1979). For further discussion of reverse-FOIA issues, see Clement, *The Rights of Submitters to Prevent Agency Disclosure of Confidential Business Information: The Reverse Freedom of Information Act Lawsuit*, 55 TEX. L. REV. 587 (1977); Note, *The Reverse FOIA Lawsuit: Routes to Nondisclosure After* Chrysler, 46 BROOKLYN L. REV. 269 (1980); Note, *Protecting Confidential Business Information from Federal Agency Disclosure after* Chrysler Corp. v. Brown, 80 COLUM. L. REV. 109 (1980); Comment, *Developments Under FOIA—1979*, *supra* note 3, at 141-46; Note, *Protection from Government Disclosure—The Reverse FOIA Suit*, 1976 DUKE L.J. 330.

had admittedly violated section 6(b)(1) in each case by attempting to disclose inaccurate information,[162] it claimed that the requirements of section 6(b)(1) applied only to affirmative, discretionary disclosures and not disclosures made under the FOIA.[163] In the earlier *Pierce & Stevens* decision, the Second Circuit accepted the Commission's argument and permitted disclosure.[164] The Third Circuit, in *GTE Sylvania*, disagreed with the *Pierce & Stevens* decision, holding instead that the reference in section 6(b)(1) to "public disclosure" applies to disclosure under the FOIA and that section 6 is a withholding statute for purposes of Exemption 3.[165]

On certiorari review of *GTE Sylvania* in the Supreme Court, the Commission again argued that section 6(b)(1) did not govern disclosures under the FOIA. Relying heavily on Judge Seitz's in-depth analysis in the court of appeals decision in *GTE Sylvania*,[166] the Court unanimously held that the provisions of section 6(b)(1) applied to disclosures under the FOIA.[167] Because section 6(b)(1) governs the "public disclosure of any information,"[168] and "as a matter of common usage the term 'public' is properly understood as including persons who are FOIA requesters,"[169] the Court rejected the Commission's position that section 6(b)(1) applied only to discretionary disclosures. That section 6(b)(2)[170] of the CPSA does not include FOIA requests in its listing of express exceptions to the requirements of section 6(b)(1) supported this conclusion.[171]

---

162. *See* GTE Sylvania, Inc. v. Consumer Prod. Safety Comm'n, 598 F.2d at 799-800; Pierce & Stevens Chem. Corp. v. Consumer Prod. Safety Comm'n, 585 F.2d at 1387.

163. 598 F.2d at 801; 585 F.2d at 1386.

164. 585 F.2d at 1386-89. *See generally* Comment, *Developments Under FOIA—1979*, supra note 3, at 149-53.

165. 598 F.2d at 803, 813.

166. In *GTE Sylvania* the court of appeals rebutted the Commission's claim after lengthy discussions of the statutory language, the legislative history, and the FOIA's inconsistencies with the CPSA. 598 F.2d at 802-15.

167. 447 U.S. at 123-24.

168. 15 U.S.C. § 2055(b)(1) (1976).

169. 447 U.S. at 108-09. There are, however, many private parties requesting information under the FOIA who might never share information disclosed to them with others.

170. 15 U.S.C. § 2055(b)(2) (1976), which exempts, among other things, information concerning imminently hazardous products, and disclosure made in the course of administrative or judicial proceedings under the CPSA.

171. 447 U.S. at 109. The Court was "reluctant" to conclude that Congress had inadvertently failed to include FOIA requests in the listing of exceptions to section 6(b)(1). "That Congress was aware of the relationship between § 6 and the FOIA when it enacted the CPSA is exhibited by the fact that Congress in § 6(a)(1) specifically incorporated by reference the nine exemptions of the FOIA . . . ." *Id.* (Section 6(a)(1), 15 U.S.C. § 2055(a)(1) (1976) provides, in part, that "[n]othing contained in this chapter shall be deemed to require the release of any information described by subsection (b) of section 552 of Title 5 . . . .").

The Court similarly found no basis in the legislative history of the CPSA for distinguishing between affirmative disclosures by the Commission and disclosure following a FOIA request in applying section 6(b)(1).[172] Nor were post-enactment legislative and administrative interpretations of section 6(b)(1) deemed authoritative.[173] Finally, the Court resolved potential inconsistencies between section 6(b)(1) and the FOIA time requirements for releasing information[174] by holding that section 6(b)(1) is a withholding statute under Exemption 3.[175] The Commission had contended that it could not comply with FOIA's time limits if the requirement in section 6(b)(1) of notice to manufacturers were applied to FOIA requests.[176] Under the Court's holding that Exemption 3 applies, the Commission may comply fully with section 6(b)(1) without running afoul of the timing provisions of the FOIA.

B. *The Federal Trade Commission Act.*[177]

On May 28, 1980, President Carter signed into law the Federal Trade Commission Improvements Act of 1980.[178] The former Federal Trade Commission Act qualified as a withholding statute under Exemption 3 of the FOIA because it prohibited disclosure of particular kinds of information.[179] Several provisions of the 1980 Act further re-

172. 447 U.S. at 110-16.

173. *Id.* at 116-20. The Commission relied upon a statement by Representative Moss—a sponsor of the CPSA generally but not of the information disclosure provision actually adopted—made during an oversight committee meeting in which he agreed with former Commission Chairman Richard O. Simpson that section 6(b)(1) was inapplicable to FOIA requests. The petitioners also attached weight to a conference report accompanying the 1976 amendments adding section 29(e) to the CPSA. Although the new section prescribed conditions for the release of information to other federal agencies or state and local authorities, and was therefore unrelated to the workings of section 6(b)(1), petitioners noted the report's statement that section 6(b) did not relate to FOIA requests.

174. Under the FOIA an agency must "determine within ten days . . . whether to comply with [a FOIA] request"; the agency must notify the requester "immediately" of its determination. 5 U.S.C. § 552(a)(6)(A)(i) (1976). The CPSA, however, requires the Commission to notify manufacturers at least 30 days before public disclosure to give manufacturers an opportunity to comment. 15 U.S.C. § 2055(b)(1) (1976).

175. *See* 447 U.S. at 121-22.

176. *See id.* at 121.

177. 15 U.S.C. §§ 41-77 (1976) (as amended).

178. Pub. L. No. 96-252, 94 Stat. 374 (1980), 15 U.S.C.A. §§ 41-77 (West Supp. 1981).

179. 15 U.S.C. § 46(f) (1976) (amended 1980), provided in part: "The Commission shall also have power . . . (f) To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest . . . ." Because the Commission does not have power to disclose trade secrets or names of customers, section 46(f) arguably operates as a withholding statute with respect to those categories of information. *See* Hunt v. Commodity Futures Trading Comm'n, 484 F. Supp. 47, 49-50 (D.D.C. 1979) (construing a similar provision of the Commodity Exchange Act, 7 U.S.C. § 12 (1976) (superseded)); Martin Marietta Corp. v. FTC, 475 F. Supp. 338, 342 (D.D.C. 1979) (by

strict the scope and quantity of information that may be disclosed pursuant to a request made to the Federal Trade Commission (FTC) under the FOIA. First, section 6(f) of the Federal Trade Commission Act[180] was amended to expand the categories of documents that the FTC may not disclose. Previously, the section prohibited disclosure of "trade secrets and names of customers."[181] The new statute expands the prohibition to include "any trade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential."[182] The amendment thus incorporates into the Federal Trade Commission Act the language of FOIA Exemption 4.[183] The effect of this amendment is to prohibit disclosure of those categories of information previously exempted under Exemption 4 from mandatory disclosure, thereby eliminating the FTC's discretionary authority to disclose such records.[184]

---

implication), *aff'd*, 1979-2 Trade Cas. ¶ 79,524 (D.C. Cir. 1979) (per curiam); Mobil Oil Corp. v. FTC, 406 F. Supp. 305, 311 (S.D.N.Y. 1976) (employing the earlier version of Exemption 3, which dealt with matters "specifically exempt[ed] from disclosure" by statute).

180. 15 U.S.C. § 46(f) (1976) (amended 1980).

181. *Id. See generally* Exxon Corp. v. FTC, 589 F.2d 582 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 943 (1979).

182. Federal Trade Commission Improvements Act of 1980, 15 U.S.C.A. § 46(f) (West Supp. 1981), which amended the Federal Trade Commission Act to read in part:

> The Commission shall also have power . . . (f) To make public from time to time such portions of the information obtained by it hereunder as are in the public interest; . . . *Provided*, That the Commission shall not have any authority to make public any trade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential . . . .

Id. (emphasis in original).

183. 5 U.S.C. § 552(b)(4) (1976) provides that FOIA disclosure obligations do not apply to "trade secrets and commercial or financial information obtained from a person and privileged or confidential." *Id.*

184. *See* H.R. CONF. REP. No. 917, 96th Cong., 2d Sess. 28, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 2309, 2310 ("The effect of the provision is to remove any discretionary authority that the Commission has to make public any information which is exempt from disclosure under the fourth exemption" of the FOIA). Generally, the FOIA's exemptions are permissive rather than mandatory. An exemption "demarcates the agency's obligation to disclose, it does not foreclose disclosure." Chrysler Corp. v. Brown, 441 U.S. 281, 292 (1979).

Although section 6(f) as amended restricts the flow of certain information to the public, it allows disclosure to appropriate federal and state agencies for law enforcement purposes. *See* 15 U.S.C.A. § 46(f) (West Supp. 1981). *See generally* Fleming v. FTC, 1980-1981 Trade Cas. ¶ 63,642 (D.D.C. 1980). An FTC decision to release a clothing manufacturer's secrets to state enforcement officials is exempt from judicial review under the Administrative Procedure Act. 5 U.S.C. § 701(a)(2) (1976). *See* Jaymar-Ruby, Inc. v. FTC, 496 F. Supp. 838 (N.D. Ind. 1980).

The amended Act also provides that line-of-business reports may not be disclosed to the public or to any federal agency. 15 U.S.C.A. § 46(f) (West Supp. 1981). Congress had previously passed three separate restrictions on FTC disclosure of line-of-business reports. "The purpose of section 4 [of the new Act] is to make permanent the protection against disclosure of line-of-business data in such a way that an individual company could be identified." S. REP. No. 500, 96th Cong., 1st Sess. 5, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 2268, 2272.

Second, the Federal Trade Commission Act was amended to include a new confidentiality section designed to complement the disclosure provisions of section 6(f).[185] Under the new provision, information the FTC acquires, other than an exempt investigation file,[186] is to be considered confidential if so denoted by the submitter.[187] Such information is not to be disclosed unless the Commission determines that it was improperly classified as confidential and the Commission notifies the submitter of the proposed disclosure.[188] The Act specifically authorizes a submitter who disagrees with the FTC's determination that the information was improperly classified to file for a stay of disclosure.[189] The Act provides that the information may not be disclosed until the court has acted upon the application for a stay.[190] The Federal Trade Commission Improvements Act of 1980 thus gives parties who have supplied the FTC with information the statutory authority to protect that information from damaging disclosure under the FOIA.[191]

Finally, section 14(f) of the new Act[192] provides that any information obtained in a law enforcement investigation either by compulsory process or by voluntary submission is exempt from FOIA disclosure.[193] This provision is intended to have a withholding effect similar to that of the investigatory records exemption[194] of the FOIA without any of the limitations present in this FOIA exemption's subsections.[195] This new

185. 15 U.S.C.A. § 57b-2 (West Supp. 1981).

186. See note 193 *infra* and accompanying text.

187. 15 U.S.C.A. § 57b-2(c)(1) (West Supp. 1981).

188. *Id.* §§ 57b-2(c)(1), (2).

189. *Id.* §§ 57b-2(c)(1), (3).

190. *Id.*

191. Not all of the provisions of the amended section 57b-2 are totally new. Some are modeled after the Antitrust Civil Process Act, 15 U.S.C. §§ 1311-1314 (1976), *as amended by* Pub. L. No. 96-349, 94 Stat. 1154 (1980), or are clarifications of certain currently existing FTC procedures. *See* S. REP. No. 500, 96th Coug., 1st Sess. 26-28, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 2268, 2293-95.

192. 15 U.S.C.A. § 57b-2(f) (West Supp. 1981).

193. *Id.* Section 14(f) provides:

> Any material which is received by the Commission in any investigation, a purpose of which is to determine whether any person may have violated any provision of the laws administered by the Commission, and which is provided pursuant to any compulsory process under sections 41 to 46 and 47 to 58 of this title or which is provided voluntarily in place of such compulsory process shall be exempt from disclosure under section 552 of Title 5.

Id. § 57b-2(f). For a discussion of this provision, see Dairymen, Inc. v. FTC, 1980-2 Trade Cas. ¶ 63,479, at 76,509 (D.D.C. 1980).

194. 5 U.S.C. § 552(b)(7) (1976). The text of the investigatory records exemption is set forth in note 250 *infra*.

195. *See* 5 U.S.C. § 552(b)(7) (1976); H.R. CONF. REP. No. 917, 96th Coug., 2d Sess. 32-33, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 2309, 2315-16.

section gives the FTC greater withholding authority over information obtained in law enforcement proceedings than is provided by the FOIA.[196] Moreover, this provision will be applied retrospectively as well as prospectively to documents obtained by the FTC.[197]

C. *Section 6103 of the Internal Revenue Code.*

Interpretation of section 6103 of the Internal Revenue Code,[198] which governs the disclosure of tax returns and return information, continued to be the subject of substantial litigation in 1980. The courts interpreting this section agree that it qualifies as a withholding statute under Exemption 3.[199] Typically, the more difficult question is whether section 6103 permits disclosure of the particular requested information.[200]

In *Zale Corp. v. IRS*[201] the District Court for the District of Columbia provided a novel interpretation of the interaction between sec-

196. *See* H.R. CONF. REP. No. 917, 96th Cong., 2d Sess. 33, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 2315-16. To withhold documents under the investigatory records exemption an agency must show that the requested records are "investigatory records compiled for law enforcement purposes" and that disclosure would violate one or more of the six other listed criteria. *See* 5 U.S.C. § 552(b)(7) (1976). Under the new section 14(f), if the FTC can show that the requested materials were received "in any [law enforcement] investigation," the records are exempt from FOIA disclosure. *See* 15 U.S.C.A. § 57b-2(f) (West Supp. 1981). All FTC investigation files therefore receive a blanket exemption under the new provision which would not necessarily exist under Exemption 7. For an application of this new provision, see Braswell, Inc. v. FTC, 985 ANTITRUST & TRADE REG. REP. (BNA) A-9 (N.D. Ga. 1980).

197. *See* Rigler v. FTC, 1980-1981 Trade Cas. ¶ 63,730 (D.D.C. 1981) ("[T]he legislative history of section [14(f)] demonstrates that it applies to documents collected before but sought to be withheld after its effective date").

198. I.R.C. § 6103. Under this lengthy provision, the Internal Revenue Service may disclose tax "return information" to various state and federal agencies, private taxpayers, and persons requesting documents under the FOIA only if "the Secretary determines that such disclosure would not seriously impair Federal tax administration." *Id.* § 6103(e)(6).

199. *See, e.g.*, Huff v. IRS, 80-2 U.S. Tax Cas. 85,327 (D. Alaska 1980); Cliff v. IRS, 496 F. Supp. 568 (S.D.N.Y. 1980); Anheuser-Busch, Inc. v. IRS, 493 F. Supp. 549 (D.D.C. 1980); Ammen v. IRS, 80-2 U.S. Tax Cas. 85,677 (W.D. La. 1980); Abbott Laboratories v. IRS, 80-2 U.S. Tax Cas. 84,753 (D.D.C. 1980); Ashton v. Kurtz, 80-2 U.S. Tax Cas. 84,505 (D.D.C. 1980); Cal-Am Corp. v. IRS, 80-1 U.S. Tax Cas. 84,144 (C.D. Cal. 1980); Bernal v. IRS, 80-2 U.S. Tax Cas. 84,864 (N.D. Cal. 1980); Wolfe v. IRS, 80-1 U.S. Tax Cas. 83,910 (D. Colo. 1980); Moody v. IRS, 80-1 U.S. Tax Cas. 83,492 (D. Colo. 1980); Kanter v. IRS, 496 F. Supp. 1004 (N.D. Ill. 1980).

200. *See, e.g.*, Cliff v. IRS, 496 F. Supp. 568 (S.D.N.Y. 1980) (memoranda prepared by IRS staff discussing the effects of various IRS Revenue Procedures on the potential or actual tax liability of several specific taxpayers constitute tax return information exempt from disclosure); Cal-Am Corp. v. IRS, 80-1 U.S. Tax Cas. 84,144 (C.D. Cal. 1980) (administrative audit files of a corporation under investigation are exempt from disclosure under I.R.C. § 6103(b)(2), Exemption 3 of the FOIA in conjunction with section 6103, and FOIA Exemption 7(A)); Moody v. IRS, 80-1 U.S. Tax Cas. 83,492, 83,495-96 (D. Colo. 1980) ("the IRS can assert other FOIA exemptions to justify the non-disclosure of return information [as defined in section 6103] without a determination of impairment by the Secretary").

201. 481 F. Supp. 486 (D.D.C. 1979).

tion 6103 and Exemption 3. In *Zale* a corporation under civil and criminal investigation by the Internal Revenue Service sought disclosure under the FOIA of several thousand pages of documents in the Service's investigation files, including an IRS Special Agent Report, which the Service had refused to release. The Service claimed that the disputed records were exempt under Exemptions 7(A)[202] and 3 of the FOIA in conjunction with section 6103(e)(6) of the Code.[203]

Before reaching the merits of the claimed exemptions, the court held that section 6103(e)(6), which allows the disclosure of tax return information when the Secretary of the Treasury concludes disclosure will not injure tax administration, is the "sole standard governing release of tax return information."[204] The standards of Exemption 3 do not, the court stated, apply to the Service's refusal to disclose information under section 6103(e)(6).[205] The court compared the FOIA, "which calls for the release of information to the public at large with no showing of need required," with section 6103(e)(6), a highly particularized statute seeking to balance disclosure and privacy interests with respect to the different groups seeking disclosure.[206] Even though the language of Exemption 3 does not permit nondisclosure based on discretionary withholding statutes,[207] the court concluded that the FOIA was not intended to supersede section 6103, especially because section 6103 was enacted shortly after the 1976 amendments to the FOIA[208] and by the same Congress.[209]

---

202. 5 U.S.C. § 552(b)(7)(A) (1976), set out in note 250 *infra* and discussed further in notes 250-66 *infra* and accompanying text.

203. I.R.C. § 6103(e)(6) ("Return information with respect to any taxpayer may be open to inspection by or disclosure to any person authorized by this subsection to inspect any return of such taxpayer if the Secretary determines that such disclosure would not seriously impair Federal tax administration").

204. 481 F. Supp. at 490. *See also* Holmes v. IRS, 46 FED. TAXES (P-H) ¶ 80-5562 (S.D. Cal. 1980).

205. The court did note that section 6103 satisfied the requirements for a withholding statute under Exemption 3. 481 F. Supp. at 490 n.13. The court concluded that the definition of "return information" found in section 6103(b)(2) was "sufficiently particularized" to fulfill the FOIA mandate that the statute "[refer] to particular types of matters to be withheld." *Id.* The court also analogized the Secretary's finding that disclosure would impair tax administration to the "particular criteria for withholding" required by Exemption 3. *Id.*

206. *Id.* at 488-89.

207. Exemption 3 refers to statutes that require withholding, establish "particular criteria for withholding," or specify "particular types of matters to be withheld." 5 U.S.C. § 552(b)(3) (1976). *Cf.* 481 F. Supp. at 491 n.13 (indicating reasons why section 6103 is a withholding statute).

208. 481 F. Supp. at 489-90. *See* Tax Reform Act of 1976, Pub. L. No. 94-455, § 1202(a), 90 Stat. 1520, 1667-85 (1976) (enacted Oct. 4, 1976); Government in the Sunshine Act, Pub. L. No. 94-409, § 5(b), 90 Stat. 1241, 1247 (1976) (enacted Sept. 13, 1976).

209. 481 F. Supp. at 488-90.

The court's determination that section 6103 governs all disclosures of tax return information shifts judicial review of the Service's decision to withhold documents from the FOIA, which requires de novo review,[210] to the Administrative Procedure Act,[211] under which the Service's decision must be upheld as long as it is not arbitrary, capricious, or an abuse of discretion.[212] Under *Zale*, the Service's exercise of the discretion granted under section 6103 to withhold information in the interest of tax administration will be upheld in almost all instances because this discretion is broader than normally allowed under the FOIA.[213]

---

210. 5 U.S.C. § 552(a)(4)(B) (1976).

211. *Id.* §§ 701-706.

212. *See* Ginter v. IRS, 80-2 U.S. Tax Cas. 85,731 (E.D. Ark. 1980). The Administrative Procedure Act provides:

> The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . . In making the foregoing determinations, the court shall review the whole record . . . .

5 U.S.C. § 706(1)(A) (1976). For further discussion about which standard of review should be employed in reviewing an agency's decision to withhold documents, see Comment, *Developments Under FOIA—1979, supra* note 3, at 141-46.

The thrust of a suit under the FOIA is to determine de novo whether the agency's decision to withhold the requested records under the claimed exemption was proper. *See* 1 J. O'REILLY, *supra* note 25, § 8.04. The court in *Zale* held that de novo review of the Secretary's decision that release of the requested records would impair tax administration is "neither necessary nor desirable." 481 F. Supp. at 490. Instead, the standard of review is "highly deferential. . . . The court must accept the Service's determination in this area of its acknowledged experience and technical competence so long as that determination is rational and has support in the record." *Id.*; *see* Kanter v. IRS, 496 F. Supp. 1004 (N.D. Ill. 1980); *cf.* Good Hope Indus., Inc. v. IRS, 49 Ad. L. 2d 1083 (D. Mass. 1980) (even assuming that *Zale* is correct in its holding that section 6103 preempts the FOIA, this does not "preclude District Court review over denial of disclosure once the talisman of 'return information' is raised" and thus "the IRS argument that a Vaughn index is not a per se requirement" has no merit).

213. *See* United States v. First Nat'l State Bank, 616 F.2d 668, 672 n.6 (3d Cir.) *cert. denied sub nom.* Levey v. United States, 447 U.S. 905 (1980). Courts have generally relied on *Zale* for the proposition that section 6103 is the sole standard governing the release of tax return information so that a determination by the Secretary of the Treasury to withhold the requested records supersedes the FOIA disclosure provisions. *See, e.g.*, Hulsey v. IRS, 497 F. Supp. 617 (N.D. Tex. 1980); United States v. First Nat'l Bank, 80-2 U.S. Tax. Cas. 85,558 (W.D. Tenn. 1980); Anheuser-Busch, Inc. v. IRS, 493 F. Supp. 549 (D.D.C. 1980); Abbott Laboratories v. IRS, 80-2 U.S. Tax Cas. 84,753 (D.D.C. 1980); Cal-Am Corp. v. IRS, 80-1 U.S. Tax Cas. 84,144 (C.D. Cal. 1980); Bernal v. IRS, 80-2 U.S. Tax Cas. 84,864 (N.D. Cal. 1980); Wolfe v. IRS, 80-1 U.S. Tax Cas. 83,910 (D. Colo. 1980); Kanter v. IRS, 496 F. Supp. 1004 (N.D. Ill. 1980). Despite *Zale*'s novel interpretation, courts have relied alternatively on the analysis that section 6103 is a withholding statute under Exemption 3. See cases cited above and note 205 *supra*. *But see* Ginter v. IRS, 80-2 U.S. Tax Cas. 85,731 (E.D. Ark. 1980) (relying solely on *Zale*'s analysis that section 6103 supersedes the FOIA). For a more complete discussion of section 6103 as an Exemption 3 withholding statute, see Chamberlain v. Kurtz, 589 F.2d 827 (5th Cir.), *cert. denied*, 444 U.S. 842 (1979).

IV. THE INTRA-AGENCY MEMORANDUM EXEMPTION

Interpretation of Exemption 5 of the FOIA has traditionally been a controversial subject,[214] and cases construing the exemption in 1980 followed that pattern. Exemption 5 relieves agencies from FOIA disclosure obligations when the requested materials are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."[215] The exemption thus operates to "exempt those documents . . . normally privileged in the civil discovery context."[216] Although many cases decided this year applied the attorney-client privilege or the attorney work-product privilege in refusing to order disclosure,[217] the more important controversies involved the deliberative-process privilege,[218] which protects from FOIA disclosure those government materials generated to assist an agency in its decision-making.[219] Exemption 5 shields documents that are deliberative—subjective rather than fac-

214. *See* 2 J. O'REILLY, *supra* note 25, § 15.01. For a discussion of developments under Exemption 5 in prior years, see Comment, *Developments Under FOIA—1979, supra* note 3, at 155-61; Note, *Developments Under FOIA—1977, supra* note 3, at 219-23; Note, *Developments Under FOIA—1975, supra* note 3, at 382-95; Comment, *Developments Under FOIA—1973, supra* note 11, at 266-74; *Project, Federal Administrative Law Developments—1969, supra* note 3, at 85-91.

215. 5 U.S.C. § 552(b)(5) (1976).

216. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975). A prior ruling on privileges in the civil discovery context, however, is not controlling in a FOIA action when a privilege is claimed. *See* Canadian Javelin, Ltd. v. SEC, 501 F. Supp. 898 (D.D.C. 1980).

217. *See, e.g.*, Radowich v. United States Attorney, 501 F. Supp. 284 (D. Md. 1980); Canadian Javelin, Ltd. v. SEC, 501 F. Supp. 898 (D.D.C. 1980); Grolier, Inc. v. FTC, 1980-2 Trade Cas. 75,987 (D.D.C. 1980); Buffalo Newspaper Guild v. NLRB, 104 L.R.R.M. 2137 (W.D.N.Y. 1980); Moody v. IRS, 80-1 U.S. Tax Cas. 83,492 (D. Colo. 1980); Grolier, Inc. v. FTC, 1980-1 Trade Cas. 77,914 (D.D.C. 1980); Kanter v. IRS, 496 F. Supp. 1004 (N.D. Ill. 1980); Sterling Drug, Inc. v. Harris, 488 F. Supp. 1019 (S.D.N.Y. 1980). *But see* Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854 (D.C. Cir. 1980) (the court denied the use of the attorney-client privilege, the attorney-work product privilege, or Exemptions 5 and 7 of the FOIA in affirming a district court order for the release of DOE memoranda between attorneys and agency auditors).

218. *See, e.g.*, Brinton v. Department of State, 636 F.2d 600, 604 (D.C. Cir. 1980) (legal opinions of the State Department Legal Adviser concerning foreign policy prepared for Secretaries of State) ("There can be no doubt that such legal advice . . . fits exactly within the deliberative process rationale for Exemption 5") *petition for cert. filed*, 49 U.S.L.W. 3711 (U.S. March 6, 1981) (No. 80-1512); Parke, Davis & Co. v. Califano, 623 F.2d 1, 6 (6th Cir. 1980) (in demonstrating that the requested documents fit into internal agency processes, the agency must show that the requested records "would not flow freely within the agency unless protected from public disclosure"); Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854 (D.C. Cir. 1980) (memoranda interpreting agency regulations from a regional counsel to field office auditors are not exempt under the deliberative process privilege); Swisher v. Department of the Air Force, 495 F. Supp. 337 (W.D. Mo. 1980) (conclusions and recommendations in an Officer's Report of Inquiry were held exempt); Cook County Legal Assistance Found. v. Office of Management & Budget, No. 79-C-3292 (N.D. Ill. Jan. 4, 1980) (documents relating to the policies and establishment of a Crisis Intervention Program were held exempt).

219. 2 J. O'REILLY, *supra* note 25, § 15.02.

tual—and predecisional—compiled in advance of a final decision or disposition and not incorporated expressly or by reference into the final agency document.[220] The purpose of the privilege, which has its roots in the doctrine of executive privilege,[221] is to keep private the internal deliberations of government agencies.[222]

The scope of the deliberative-process privilege was examined in *Taxation With Representation Fund v. IRS*.[223] The plaintiff, a non-profit tax-news publisher, requested all General Counsel Memoranda,[224] Technical Memoranda,[225] and Actions on Decisions,[226] as

220. *See id.* § 15.07. The duty to disclose a given document often depends on the finality of an agency's action in view of the FOIA's prohibition of withholding final opinions or dispositions and statements of policy. *See* NLRB v. Sears, Roebuck & Co., 421 U.S. at 150-54; Brinton v. Department of State, 636 F.2d 600, 605 (D.C. Cir. 1980) ("Exemption 5 does not protect final statements of policy or final actions of agencies, which have the force of law or which explain actions the agency has already taken") *petition for cert. filed*, 49 U.S.L.W. 3711 (U.S. March 6, 1981) (No. 80-1512); Note, *Developments Under FOIA—1975, supra* note 3, at 372-75.

The finality issue arises in other contexts as well. *See* Green v. Department of Commerce, 618 F.2d 836 (D.C. Cir. 1980) (a district court order requiring notification of companies that their previously submitted boycott reports would be disclosed and permitting the submitters to comment was not an appealable final order until the court determined what information would actually be disclosed to a FOIA requester); Shermco Indus. v. Secretary of the Air Force, 613 F.2d 1314 (5th Cir. 1980) (government contract bidder's request for its competitor's pricing information must be denied insofar as notice to unsuccessful bidders was not a final award of the contract subject to automatic disclosure under section 552(a)(2)(A); furthermore the information was exempt under Exemption 4); Swisher v. Department of the Air Force, 495 F. Supp. 337, 340 (W.D. Mo. 1980) (an "allusion" to disputed documents in later documents does not constitute an " '*express*' adoption or incorporation") (emphasis in original).

221. 2 J. O'REILLY, *supra* note 25, § 15.03.

222. *See* NLRB v. Sears, Roebuck & Co., 421 U.S. at 150-54; Ryan v. Department of Justice, 617 F.2d 781, 789 (D.C. Cir. 1980) (Exemption 5 "was created to protect the deliberative process of the government, by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision-makers without fear of publicity"); Falcone v. IRS, 479 F. Supp. 985, 988 (E.D. Mich. 1979) ("[t]he principal purpose of Exemption 5 is the protection of the common-law evidentiary privilege that attaches to predecisional, deliberative communications within an agency") (citation omitted), *appeal pending*, No. 80-1105 (6th Cir.).

223. 485 F. Supp. 263 (D.D.C. 1980), *modified*, No. 78-2304 (D.D.C. Apr. 22, 1980) (portions of memoranda falling under Exemption 3 and I.R.C. § 6103 were exempted from disclosure), *aff'd in part, modified in part, and remanded*, 81-1 U.S. Tax Cas. 86,580 (D.C. Cir. 1981).

224. General Counsel Memoranda are responses by the Office of the Chief Counsel to requests for legal advice concerning proposed private letter rulings, proposed technical advice memoranda, and proposed revenue rulings of the IRS. 485 F. Supp. at 265-66.

225. Technical Memoranda provide background information, highlight legal or policy issues, and describe the approach and rationales of the draftsman of a proposed rule for use in conjunction with the issuance of a Treasury Decision. *Id.* at 267.

226. Actions on Decisions provide a summary of every case the IRS loses in the Tax Court or in a district court with the preparer's recommendation for acquiescence or non-acquiescence in the decision. *Id.* at 266-67.

well as their related indices,[227] issued after July 4, 1967[228] and in the possession of the Internal Revenue Service. The Service argued that the requested records were exempt from disclosure under the deliberative-process privilege of Exemption 5. The *Taxation* court interpreted the Supreme Court's 1975 decision in *NLRB v. Sears, Roebuck & Co.*[229] as requiring disclosure when the requested records "contain the reasons behind policy actually adopted."[230] Because the requested records contained the reasons behind policies and positions adopted by the Internal Revenue Service, the court held that they were not protected by Exemption 5.[231] In supplemental proceedings, the district court modified its original decision by adding an alternative holding that the requested memoranda and indices were subject to the affirma-

227. The service indexes each of the three types of memoranda for use in preparing future documents, rulings, and IRS decisions, preparing for litigation, as well as to provide a mechanism for consistent decision-making. *Id.* at 266-67.

228. This date corresponds to th effective date of the 1967 amendments that gave the FOIA its present structure. Pub. L. No. 90-23, 81 Stat. 54 (1967).

229. 421 U.S. 132 (1975). In *Sears* the Court held that "Advice" and "Appeal" memoranda generated by the Office of the General Counsel of the National Labor Relations Board, explaining the Board's decisions not to file unfair labor practice complaints, were final opinions not exempt under the FOIA. Explaining that these documents reflect the agency's final disposition of the disputes, the Court concluded that Exemption 5 could never apply to authorize a withholding of "final opinions." Those memoranda describing a Director's decision recommending the filing of a complaint were held not to be final opinions because they did not effect a final disposition of the matter for which they were created. 421 U.S. at 150-60.

230. 485 F. Supp. at 265:

> The [*Sears*] Court noted that "[c]rucial to the decision of this case is an understanding of the function of the documents in issue in the context of the administrative process which generated them." . . . [T]he public is . . . "vitally concerned with the reasons which did supply the basis for an agency policy actually adopted . . . ."

Id. For further discussion of *Sears*, see K. DAVIS, *supra* note 28, § 3A.21-2.

231. Although it cited no authority besides *Sears* for its decision, the court noted that its conclusions were supported by two recent district court decisions. It neglected, though, to note the limited holdings of those cases. *See* Pies v. IRS, 484 F. Supp. 930 (D.D.C. 1979) (holding that a four-page Technical Memorandum discussing a proposed regulation was not exempt from FOIA disclosure by means of Exemption 5 because, even though not formally enacted, the memorandum and the proposed regulation had been incorporated into actual regulations and had been used in rendering IRS opinions), *appeal pending*, No. 79-2303 (D.C. Cir.); Falcone v. IRS, 479 F. Supp. 985 (E.D. Mich. 1979) (a General Counsel Memorandum describing the aspects of a proposed revenue ruling was ordered disclosed because it was a statement of policy adopted by the Service), *appeal pending*, No. 80-1105 (6th Cir.).

See also Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 869 (D.C. Cir. 1980) (memoranda interpreting Department of Energy regulations written by regional counsel for the benefit of field office auditors are not exempt under any Exemption 5 privilege); Caspe v. United States, 80-1 U.S. Tax Cas. 83,312 (S.D. Iowa 1980) (two General Counsel Memoranda relating to revenue rulings were ordered produced in light of Falcone v. IRS because they were not deliberative), *appeal pending*, No. 80-1604 (8th Cir.); Grolier, Inc. v. FTC, 1979-1 Trade Cas. 77,906 (D.D.C. 1979) (staff memoranda incorporated by reference into summary memoranda are not exempt from discovery).

tive disclosure provisions of section 552(a)(2) of the FOIA.[232] In light of this holding, the court also determined that the Service has "a 'continuing duty' to make the records and indices available."[233]

After determining that Exemption 5 does not protect documents reflective of adopted policies,[234] the Court of Appeals for the District of Columbia Circuit affirmed the lower court's decision that the plaintiff was entitled to disclosure of all memoranda named in the request meeting the adopted-policy standard.[235] Instead of relying almost exclusively on *Sears*, as had the district court,[236] the court of appeals considered cases from its own circuit as well as other decisions of the Supreme Court.[237] Although the requesters claimed disclosure under both section 552(a)(2)[238] and section 552(a)(3)[239] of the FOIA, the court of appeals did not decide which section mandated disclosure; records meeting the adopted-policy standard are apparently disclosable under both sections.[240]

With respect to the application of the adopted-policy standard to the requested memoranda, the two *Taxation* decisions differed signifi-

---

232. 485 F. Supp. 263 (D.D.C. 1980), *modified*, No. 78-2304 (D.D.C. Apr. 22, 1980), *aff'd in part, modified in part, and remanded*, 81-1 U.S. Tax Cas. (CCH) 86,580: *see id.* at 86,588.

5 U.S.C. § 552(a)(2) (1976) provides in part:

> Each agency . . . shall make available for public inspection and copying—(A) final opinons . . . made in the adjudication of cases; (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and (C) adminsitrative staff manuals and instructions to staff that affect a member of the public; [and] . . . indexes . . . .

233. *See* 81-1 U.S. Tax Cas. (CCH) at 86,588. In typical FOIA suits the agency is obligated to disclose only nonexempt information that is already in existence. *See* Forsham v. Harris, 445 U.S. 169, 182 (1980); 1 J. O'REILLY, *supra* note 25, §§ 5.03, 5.07. Under the affirmative disclosure provisions of section 552(a)(2), however, prospective disclosure obligations can easily be implied.

234. 81-1 U.S. Tax Cas. (CCH) at 86,588-92.

235. *See id.* at 86,592-94.

236. *See* 485 F. Supp. at 265. The district court made no reference to decisions in the District of Columbia Circuit prior to *Sears* that might have provided support for its adopted-policy standard. *See, e.g.*, Ash Grove Cement Co. v. FTC, 511 F.2d 815, 817-18 (D.C. Cir.), *rehearing denied*, 519 F.2d 934 (D.C. Cir. 1975); Schwartz v. IRS, 511 F.2d 1303, 1305-06 (D.C. Cir. 1975); Sterling Drug, Inc. v. FTC, 450 F.2d 698, 704-10 (D.C. Cir. 1971). See note 231 *supra*. *See also* Brinton v. Department of State, 636 F.2d 600, 605 (D.C. Cir. 1980) (final statements of policy are not protected by Exemption 5), *petition for cert. filed*, 49 U.S.L.W. 3711 (U.S. March 6, 1981) (No. 80-1512).

237. *See* 81-1 U.S. Tax Cas. (CCH) at 86,588-92. The court of appeals quoted from the *Sears* opinion but declined to place principal reliance on it, perhaps because the actual holding in *Sears* did not require disclosure of adopted policies. *See* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 5:35, at 407-09 (2d ed. 1978).

238. See note 232 *supra*.

239. 5 U.S.C. § 552(a)(3) (1976): "[E]ach agency, upon any request for records . . . , shall make the records promply available to any person."

240. For a discussion of the interaction between affirmative disclosure under section 552(a)(2) and request oriented disclosure under section 552(a)(3), see 1 K. DAVIS, *supra* note 237, § 5:4 (1978 & Supp. 1980).

cantly. Relying on affidavits of various officials in the Office of the Chief Counsel that described the Service's extensive use of the memoranda, the district court concluded that all the requested documents explained or reflected adopted policy even though the court did not specifically find that each memorandum satisfied this standard.[241] In contrast, the court of appeals reviewed the Service's affidavits and more carefully scrutinized the functions and uses of the requested memoranda;[242] the court implicitly recognized that a blanket application of the adopted-policy standard would be inappropriate. Because the court of appeals found that the three categories of memoranda named in the request were actually representative of many different types of documents, it modified the district court's disclosure order to exclude those types of memoranda that were not reflective of adopted policies.[243] The court held that some of the records were only in the predecisional stages of agency promulgation and were thus shielded from disclosure under Exemption 5.[244] Similarly, the court found that certain Technical Memoranda relating to decisions and regulations that the Service had never approved, and General Counsel Memoranda that had never been distributed for use within the agency, could not be considered "adopted policy" and were therefore exempt.[245] In addition, the court of appeals remanded for a determination of whether memoranda, which recommended appeal of a decision adverse to the Service, received the Assistant Commissioner's approval or contained information concerning litigation strategy.[246] The court believed that such findings would be necessary to a conclusion that the documents contain "adopted policy."[247]

The *Taxation* decisions required disclosure of agency memoranda that reflect only adopted policies. Because application of this standard to requested records is a factual matter,[248] courts faced with requests covering large numbers of ostensibly similar documents will most

241. *See* 485 F. Supp. at 264-67.

242. *See* 81-1 U.S. Tax Cas. (CCH) at 86,582-86, 86,592-94.

243. *See id.* at 86,592-94.

244. *Id.* at 86,592.

245. *Id.*

246. *Id.*

247. *Id.* See note 229 *supra*.

248. "We emphasize the particular nature of the [memoranda] here in issue because other judicial opinions have suggested different variations . . . ." 81-1 U.S. Tax Cas. (CCH) at 86,592 n.22 (citations omitted). *See, e.g.*, Cliff v. IRS, 496 F. Supp. 568 (S.D.N.Y. 1980), in which the court refused to allow the requester of an IRS memorandum to rely on the district court decision in *Taxation* because the *Taxation* court's definition of a General Counsel Memorandum did not include references to a proposed revenue procedure—the substance of the memorandum requested in *Cliff*. *Id.* at 577.

likely demand extensive evidence on the nature and function of documents from agencies claiming exemption under the deliberative-process privilege.[249]

V. THE INVESTIGATORY RECORDS EXEMPTION

Exemption 7 of the FOIA[250] permits agencies to withhold "investigatory records compiled for law enforcement purposes" if production of the records would violate one or more of six additional criteria. Although many courts considered issues under Exemption 7 in 1980,[251]

249. This procedure is analogous to the particularizations required by the Vaughn index that is used in many FOIA cases. *See* Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974); 1 K. DAVIS, *supra* note 237, § 5:27, at 384.

250. 5 U.S.C. § 552(b)(7) (1976). The investigatory records exemption provides:

> This section does not apply to matters that are . . . (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel . . . .

Id. See generally Ellsworth, *Exemption 7 of the FOIA: Law Enforcement Records*, in LITIGATION UNDER THE FEDERAL FREEDOM OF INFORMATION ACT AND PRIVACY ACT 93 (5th ed. C. Marwick ed. 1980).

251. *See, e.g.*, Abramson v. FBI, 1 GOV'T DISCLOSURE SERV. (P-H) ¶ 80,266 (D.C. Cir. 1980) (in evaluating Exemption 7(C) claims, a court must determine that the disputed documents are "investigatory record[s]" "compiled for law enforcement purposes" before considering whether disclosure would invade personal privacy; when information is derived from existing documents and "recompiled in a new document for a new purpose, the new document must qualify independently for any" FOIA exemptions); Duffin v. Carlson, 636 F.2d 709, 712 (D.C. Cir. 1980) (Exemption 7(D) provides two separate exemptions, one for the identity of a confidential source and one for information furnished by a confidential source regardless of whether the information contains the informant's identity); Keeney v. FBI, 630 F.2d 114 (2d Cir. 1980) (local law enforcement agencies constitute confidential sources under Exemption 7(D)); Lesar v. Department of Justice, 636 F.2d 472, 479, 487-88 (D.C. Cir. 1980) (state and local law enforcement agencies are confidential sources) (the names of FBI agents may be exempt from disclosure under Exemption 7(C) in some circumstances; there is no blanket exemption for all agents' names); Kuehnert v. FBI, 620 F.2d 662 (8th Cir. 1980) (information derived from illegal domestic surveillance can still be "compiled for law enforcement purposes"); Church of Scientology v. Department of Justice, 612 F.2d 417 (9th Cir. 1979) (foreign, state, and local law enforcement agencies constitute confidential sources under Exemption 7(D)); Copus v. Rougeau, 504 F. Supp. 534, 538-39 (D.D.C. 1980) (quarterly compliance review forecasts created by the Department of Labor's Office of Federal Contract Compliance Programs describing and recommending review of certain contractors' discriminatory practices are shielded from disclosure by Exemption 7(A)); Radowich v. United States Attorney, 501 F. Supp. 284 (D. Md. 1980) (an unjustified promise of confidentiality precludes use of Exemption 7(D)); Canadian Javelin, Ltd. v. SEC, 501 F. Supp. 898 (D.D.C. 1980) (that documents are provided by law enforcement agencies is insufficient, by itself, to infer that the required promise of confidentiality was made); Fedders Corp. v. FTC, 494 F. Supp. 325 (S.D.N.Y. 1980) (unsolicited complaint letters received by the Federal Trade Commission before an investigation may become investigatory records compiled for law enforcement purposes once the letters are

the most significant development concerned Exemption 7(A),[252] which exempts investigatory records if disclosure would "interfere with enforcement proceedings." In *Moorefield v. United States Secret Service*[253] the Court of Appeals for the Fifth Circuit considered a FOIA request by Moorefield, who, after being convicted for two attempts to assassinate the President, requested all documents in the file the Secret Service maintained on him. The Service denied the request, claiming the entire file was subject to Exemption 7, without specifying how the exemption applied to particular documents. Moorefield argued that Exemption 7(A) did not apply. He contended that he was no longer suspected of criminal activity and that the Secret Service's ongoing interest in him as a potential threat did not amount to "enforcement proceedings" within the meaning of the exemption. In Moorefield's view enforcement proceedings were limited to judicial proceedings; no interference with enforcement proceedings occurred because the Service contemplated no judicial action against him.[254]

Judge Tjoflat, writing for the court, rejected this theory, holding that the Secret Service's activities in investigating potential criminals constitute enforcement proceedings under Exemption 7(A).[255] Acknowledging that in most circumstances it is "reasonable to equate 'enforcement proceeding' with an adjudicatory procedure,"[256] Judge Tjoflat concluded that the Secret Service's investigation constituted an exception to this generalization. Secret Service investigations are undertaken to prevent attacks against persons the Service is protecting, in contrast to typical law enforcement investigations, which are conducted to apprehend and prosecute law-breakers.[257] Both types of investigations, however, are "directed toward an active and concrete effort to enforce the law"; both, therefore, are properly designated "enforcement proceedings."[258]

---

compiled into an active investigation file); Murphy v. FBI, 490 F. Supp. 1138, 1142-43 (D.D.C. 1980) (release of ABSCAM tapes to the public through unauthorized leaks does not preclude a finding that redisclosure would interfere with enforcement proceedings); OKC Corp. v. Williams, 489 F. Supp. 576, 584 (N.D. Tex. 1980) ("it cannot be said as a matter of law that disclosure of all types of material in investigatory files would necessarily interfere with all types of enforcement proceeding[s]"; the court must examine the "type of material sought and the type of enforcement proceeding . . . contemplated" to determine whether interference would occur).

252. 5 U.S.C. § 552(b)(7)(A) (1976), set out in note 250 *supra*.

253. 611 F.2d 1021 (5th Cir.), *cert. denied*, 101 S. Ct. 283 (1980).

254. 611 F.2d at 1024.

255. *Id.* at 1026.

256. *Id.* at 1024.

257. *Id.* at 1025.

258. *Id.* The court looked to the views of Senator Hart, who introduced the 1974 exemption amendment, and concluded that " 'enforcement proceedings' correspond with 'law enforcement purposes,' and such purposes include the prevention as well as the detection and punishment of

Finding that disclosure of the investigatory file would interfere with the enforcement proceedings, the court exempted the entire file from disclosure.[259] The court noted that ordinarily an agency must specify why each document in a withheld file falls within a FOIA exemption.[260] But, relying on the Supreme Court's decision in *NLRB v. Robbins Tire & Rubber Co.*,[261] Judge Tjoflat concluded that Exemption 7(A) permits generic determinations that entire files should be withheld.[262]

The Supreme Court denied certiorari in *Moorefield*, with Justices White and Brennan dissenting.[263] Justice White questioned the decision of the court of appeals with respect to both its expansive reading of "enforcement proceedings" and its determination that the entire file was exempt.[264] Pointing out that other law enforcement agencies engage in prophylactic investigations, Justice White explained that after *Moorefield* "arguably many investigatory files of other law enforcement agencies also qualify for exemption."[265] In addition, Justice White asserted that *Robbins Tire* permits a generic determination of exemption only for particular types of documents, not for entire investigatory files.[266]

---

violations of the law." *Id.*; *see* 120 CONG. REC. 17033 (1974) (remarks of Sen. Hart, which may be given less weight than the court gave them). As support for its conclusion, the court relied heavily on NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978), in which the Supreme Court upheld under Exemption 7(A) the withholding of potential witnesses' statements in an NLRB investigation. *See generally* Note, *Developments Under FOIA—1978, supra* note 3, at 339-43. According to the Fifth Circuit Court of Appeals's decision in *Robbins Tire*, Congress enacted Exemption 7(A) in 1974 to overrule judicial decisions prohibiting disclosure in "closed" cases. 611 F.2d at 1024; *see* 437 U.S. at 226-29. But, explained Judge Tjoflat, "[t]he Court in *Robbins Tire* found that when Congress enacted the 1974 amendments, it did not wish to alter or undercut the existing FOIA exemptions . . . ." 611 F.2d at 1025; *see* 437 U.S. at 233-34. Because Congress "clearly" intended, under the original FOIA, to exempt open Secret Service files, Judge Tjoflat concluded that Exemption 7(A) should shield the file at issue. 611 F.2d at 1025-26.

259. 611 F.2d at 1026.

260. *Id.* at 1023.

261. 437 U.S. 214 (1978). In *Robbins Tire* the Court stated that "generic determinations" that records in investigatory files fall within Exemption 7(A) are permissible: "We conclude that Congress did not intend to prevent the federal courts from determining that, with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally 'interfere with enforcement proceedings.' " *Id.* at 236.

262. 611 F.2d at 1024, 1026.

263. 101 S. Ct. 283 (1980).

264. *Id.* at 284-85 (White, J., dissenting).

265. *Id.* at 285.

266. *Id.* An investigatory file may include different types of documents. A generic determination with respect to an entire file thus seemed to Justice White inconsistent with *Robbins Tire*, in which the Supreme Court stated:

> [B]y substituting the word 'records' for 'files,' [the Amendment] would make clear that courts had to consider the nature of the particular document as to which exemption was claimed, in order to avoid the possibility of impermissible 'commingling' by an agency's

VI. CONCLUSION

As in prior years, judicial developments under the FOIA in 1980 were largely unsuccessful in resolving the problem areas underlying the litigation. The Supreme Court in *Kissinger, Forsham*, and *Consumers Union* considered all three of the threshold requirements for a suit under the FOIA without giving any manageable standards for future cases. The Court's restrictive interpretations of these criteria may shield certain records and quasi-agencies that appeared to fall within the Act. Some disputes fundamental to document classification under the national security exemption were resolved in ways that may further restrict disclosures. The *GTE Sylvania* Court's resolution of a conflict over the applicability of the Consumer Product Safety Act to FOIA requests, which resolution favored information submitters, and the enactment of the Federal Trade Commission Improvements Act may signal increased protection of business and confidential information at the expense of FOIA requesters. Similarly, the blanket disclosure exemption now accorded the Federal Trade Commission and the Secret Service for investigation files indicates at least a partial reversal in the full-disclosure purpose of the FOIA. In 1980 the evolution of FOIA law continued, displaying a clear trend toward restricting the availability of disclosure.

James R. Peacock III

placing in an investigatory file material that did not legitimately have to be kept confidential.

437 U.S. at 229-30, *quoted in* 101 S. Ct. at 285 (White, J., dissenting).